United States Court of Appeals

for the Second Circuit

APPENDIX

Appeal [illegible] 8715-3

75-7259

Supreme Court

OF THE STATE OF NEW YORK

APPELLATE DIVISION – SECOND DEPARTMENT

FRANK LOWELL,

Plaintiff-Appellant,

-against-

LEM INSTRUMENT CORP.,

Defendant-Respondent.

B

EXHIBIT

FRANK LOWELL
v.
TWIN DISC, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 75-7259

PLAINTIFF-APPELLANT'S APPENDIX
Volume I — Pages A-1 — A-26 and 1—336

SIDNEY S. BOBBE
Attorney for Plaintiff-Appellant
36 West 44th Street
New York, N.Y. 10036
682-7218

WILLKIE FARR & GALLAGHER
Attorneys for Defendant-Respondent
1 Chase Manhattan Plaza
New York, N.Y. 10005
248-1000

UNITED STATES COURT OF APPEALS
FILED
JUL 3 1975
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SECOND CIRCUIT

Suffolk County Clerk's Index Number 73-1733

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STATEMENT UNDER CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-SECOND DEPARTMENT

FRANK LOWELL,
Plaintiff-Appellant,

-against-

LEM INSTRUMENT CORP.,
Defendant-Respondent.

---

1. Index Number 73-1733.

2. The full names of the original parties are as listed in title above; there has been no change.

3. Action commenced in Supreme Court, Suffolk County.

4. Summons and Complaint sworn to December 15, 1972; Amended Verified Answer sworn to February 20, 1973.

5. Plaintiff appeals from the judgment which dismissed the complaint on the merits and awarded to the defendant costs, as against the plaintiff, in the sum of $447.00.

6. Appeal is from the judgment entered in the office of the Clerk of the County of Suffolk on October 29, 1973 made by Mr. Justice John F. Scileppi.

7. The Appendix method of appeal is being used.

NOTICE OF APPEAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK
- X

FRANK LOWELL,

Plaintiff,

-against-

LEM INSTRUMENT CORP.,

Defendant.

- X

SIRS:

PLEASE TAKE NOTICE that the plaintiff above-named hereby appeals to the Appellate Division of the Supreme Court, Second Department, from the judgment entered in the office of the Clerk of this Court on the 29th day of October, 1973, which judgment dismissed the complaint on the merits and awarded to the above-named defendant costs, as against the plaintiff, in the sum of $447.00.

Dated: New York
November 1, 1973

Yours, etc.,
SIDNEY S. BOBBE,
Attorney for Plaintiff,
36 West 44th Street
New York City 10036

TO: WILLKIE FARR &
GALLAGHER, Esqs.,
Attys. for Deft.
1 Chase Manhattan Plaza
New York, N.Y. 10005

LESTER M. ALBERTSON
Clerk of the County of Suffolk
Riverhead, N.Y.

JUDGMENT APPEALED FROM

- - - - - - - - X

SAME TITLE

- - - - - - - - X

The above-entitled action having been regularly brought on for trial at a Trial Term, Part VI, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the County Courthouse, Riverhead, New York, on the 9th, 10th, 11th and 12th days of October, 1973, before Mr. Justice John F. Scileppi, sitting with a jury, and both parties having appeared by their respective attorneys, and the jury having unanimously rendered its verdict for defendant, Lem Instrument Corp., on October 12, 1973, dismissing the Complaint, and the Court having denied plaintiff's motion to set aside the verdict, and the Court having directed that defendant have its costs,

NOW, on motion of WILLKIE FARR & GALLAGHER, attorneys for defendant, it is

ADJUDGED, that the Complaint in the above-entitled action be, and the same hereby is, dismissed on the merits and that the defendant Lem Instrument Corp., whose address is 20 Sarah Drive, Farmingdale, New York, recover of the plaintiff, Frank Lowell, whose address

JUDGMENT APPEALED FROM

is 25 Alpine Way, Huntington Station, New York, the sum of $447.00 costs, as taxed in this action, and that the defendant have execution therefor.

Riverhead, New York
October 29, 1973

s/Lester M. Albertson
Clerk

Filed Oct. 29, 1973

SUMMONS

- - - - - - - - X

SAME TITLE

- - - - - - - - X

Plaintiff designates Suffolk County as the place of trial. The basis of the venue is Plaintiff resides in Suffolk County. Plaintiff resides at 25 Alpine Way, Huntington Station, N.Y.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York
December 15, 1972

SIDNEY S. BOBBE
Attorney for Plaintiff
Office & P.O. Address
36 West 44th Street
New York, N.Y. 10036

NOTICE: The object of this action is award of damages for breach of contract. The relief sought is do.

VERIFIED COMPLAINT

- - - - - - - - X

SAME TITLE

- - - - - - - - X

The plaintiff, by SIDNEY S. BOBBE, for his complaint herein alleges as follows, on information and belief:

FOR A FIRST CAUSE OF ACTION

1. That plaintiff resides in the County of Suffolk, State of New York.

2. That defendant is a domestic corporation, having its principal place of business at Farmingdale, New York.

3. That on or about the 3rd day of July, 1968, the plaintiff and the defendant duly executed a written employment contract whereby plaintiff was employed as defendant's general manager and president for a term of seven years commencing on July 3, 1968.

4. That plaintiff entered upon the performance of said contract, and duly performed all the terms and conditions thereof agreed to be performed by him, until on or about the 9th day of October, 1972, on which date, at Farmingdale, New York, defendant wrongfully breached said contract and terminated plaintiff's employment.

5. That by reason of said breach, plaintiff has been damaged in the sum of upwards of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

FOR A SECOND CAUSE OF ACTION

6. Plaintiff repeats the allegations of the first cause of action with the same force and effect as if herein set forth at length.

7. That pursuant to the terms of said employment contract, it was provided that the annual salary to be paid to plaintiff during the term of the contract was $35,000.00, "with cost of living adjustments" such as were "accorded to employees" by Twin Disc Incorporated, a Wisconsin corporation, with a "beginning base salary of $26,120.00 per annum, plus the applicable cost of living adjustment."

8. On information and belief, that the aforesaid sum of $35,000.00 was computed on said base of $26,120.00 by adding thereto the cost of living adjustment based on the index of such cost of living furnished by the United States Bureau of Labor Statistics, taking the year 1950 as the base period.

9. On information and belief, that due to increases in the cost of living as reflected by said Labor Department index, showing that such cost had

increased for the years subsequent to December 31, 1968, the salary that became due and owing to plaintiff under said employment contract for the period subsequent to December 31, 1968 approximated the sum of $25,000.00 over and above the salary actually paid to plaintiff at the said rate of $35,000.00 per annum.

10. That no part thereof has been paid.

11. That said employment contract also provided for the furnishing by defendant to plaintiff of specific fringe benefits, but defendant has failed and refused to make said benefits available to plaintiff, except that it has furnished him with a company automobile.

12. On information and belief, that the failure to furnish said fringe benefits to plaintiff up to the time of said wrongful discharge has caused further damage to the plaintiff in the sum of approximately $25,000.00.

13. That plaintiff has been damaged by reason of the facts set forth in this cause of action in the sum of Fifty Thousand ($50,000.00) Dollars.

WHEREFORE plaintiff demands judgment against the defendant on the first cause of action in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars; on the second cause of action in the sum of Fifty

Thousand ($50,000.00) Dollars, or in the aggregate, in the sum of Three Hundred Thousand ($300,000.00) Dollars, together with appropriate interest and the costs and disbursements of this action.

SIDNEY S. BOBBE,
Attorney for Plaintiff
36 West 44th Street
New York, N.Y. 10036
Tel. MU 2-7218

[Verified by
Sidney S. Bobbe]

Sworn to
December 15th, 1972

AMENDED VERIFIED ANSWER

- - - - - - - - X

SAME TITLE

- - - - - - - - X

Defendant answering:

AS TO THE FIRST CAUSE OF ACTION

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Admits the allegations contained in paragraph 2 of the Complaint.

3. Upon information and belief denies each and every allegation contained in paragraph 3 of the Complaint, except it admits that on July 3, 1968, it entered into an agreement with plaintiff, and respectfully refers to said agreement for its exact terms and conditions.

4. Upon information and belief denies each and every allegation contained in paragraphs 4 and 5 of the Complaint.

AS TO THE SECOND CAUSE OF ACTION

5. For its answer to the allegations contained in paragraph 6 of the Complaint, repeats and realleges each and every allegation contained in para-

graphs 1 through 4 of this Answer with the same force and effect as if herein again set forth at length.

6. Upon information and belief denies each and every allegation contained in paragraph 7 of the Complaint, except that it admits that on July 3, 1968, it entered into an agreement with plaintiff, and respectfully refers to said agreement for its exact terms and conditions.

7. Denies knowledge or information sufficient to form a belief as to the truth of paragraphs 8 and 9 of the Complaint.

8. Admits that it has not paid the sum of $25,000 referred to by reference in paragraph 10 of the Complaint.

9. Upon information and belief denies each and every allegation contained in paragraph 11 of the Complaint, except that it admits that on July 3, 1968, it entered into an agreement with plaintiff and respectfully refers to said agreement for its exact terms and conditions.

10. Upon information and belief denies each and every allegation contained in paragraphs 12 and 13 of the Complaint.

AMENDED VERIFIED ANSWER

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE

11. Defendant denies that plaintiff duly performed all of the conditions precedent of the agreement described in the Complaint herein, required on his part to be performed, and avers that plaintiff, inter alia, failed: (1) to achieve the level of performance anticipated for Lem in the "Operation Plans", (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company, and (11) to provide proper leadership for Lem.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE

12. Defendant avers that plaintiff was discharged for cause in that he failed, inter alia: (1) to achieve the level of performance anticipated for Lem in the "Operation Plans", (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4)

to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company and (11) to provide proper leadership for Lem.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE

13. Defendant avers that plaintiff was discharged because he had not faithfully and diligently performed the duties of his employment in that he, inter alia, failed: (1) to achieve the level of performance anticipated for Lem in the "Operation Plans", (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately; (9) and to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company, and (11) to provide proper leadership for Lem.

AMENDED VERIFIED ANSWER

AS AND FOR A FOURTH SEPARATE AND PARTIAL DEFENSE

14. The plaintiff's action is premature insofar as it seeks damages for services to have been rendered in the future.

AS AND FOR A FIFTH SEPARATE AND PARTIAL DEFENSE

15. Plaintiff has failed to mitigate his alleged damages.

WHEREFORE, defendant demands judgment dismissing the Complaint, together with the costs and disbursements of this action.

WILLKIE FARR & GALLAGHER
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 248-1000

[Verified by
Wilton B. Gibson]

Sworn to
February 20th, 1973

INTERMEDIATE ORDER DENYING MOTION

PRESENT:

HON. ALEXANDER BERMAN

Justice.

- - - - - - - - X

SAME TITLE

- - - - - - - - X

The following papers numbered 1 to 21 read on this motion to dismiss defenses.

Notice of Motion/Order to Show Cause, papers numbered 1-7.

Answering Affidavits, papers numbered 8-13.

Replying Affidavits, papers numbered 14-15.

Upon the foregoing papers it is ordered that this motion by plaintiff for an order pursuant to CPLR 3211(b) dismissing defendant's five affirmative defenses, and for summary judgment, is granted to the extent that the "Fourth Separate and Partial Defense" is dismissed and is otherwise denied.

The contention that plaintiff may not claim damages in connection with services which were to have been rendered in the future, is without merit. It well may be that the damages to which he will be entitled, if he should succeed in the action, will not equal the total wages which would have been payable during the remainder

of the term of his contract. However, that is a question to be determined upon the trial and does not deprive plaintiff of the right to sue for the full amount, which would be the "prima facie measure" of his damage (Hollwedel v. Duff-Mott Company, Inc., 263 N.Y. 95, 101.)

The Court does not agree with plaintiff's position as to the insufficiency of the other defenses. Insofar as the "First Separate and Complete Defense" is concerned, it may be that certain of plaintiff's alleged failures did not involve "conditions precedent". However, when a party is employed by a corporation as its General Manager and President, it certainly may be inferred that the "conditions" of such employment include dealing with its employees and customers harmoniously and in the best interests of the company and providing proper leadership for the company. In the opinion of the Court, defendant has sufficiently pleaded plaintiff's alleged failure to perform those conditions (CPLR 3015(a)).

The "Second" and "Third" defenses are, likewise, sufficient and defendant should be afforded the opportunity, upon the trial, to prove that its discharge of the plaintiff was justified. Sufficient material and triable issues of fact have been raised with respect to plaintiff's performance of his duties under the contract

to preclude the granting of summary judgment (Sillman v. Twentieth Century-Fox Film Corporation, 3 N.Y.2d 395, 404.).

Insofar as the "Fifth Separate and Partial Defense" is concerned, the question of whether plaintiff has failed to mitigate his alleged damages is one to be determined by the triers of the facts. The fact that it may not be necessary for the defendant to plead such a defense in order to disprove plaintiff's damage claim (concurring opinion, McClelland v. Climax Hosiery Mills 252 N.Y. 347, 354, 355, modified 253 N.Y. 533) does not render the "Fifth" defense insufficient but merely superfluous.

Enter in Suffolk County.

Dated, 4/12/73

s/A.B.
J.S.C.

MOTION TO DISMISS DEFENSES

- - - - - - - - X

SAME TITLE

- - - - - - - - X

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein, the amended answer thereto, and upon the annexed affidavit of Frank Lowell, verified March 5, 1973, the undersigned will move this Court at Special Term, Part I, thereof, to be held at the Nassau County Courthouse, Mineola, New York, on the 19th day of March, 1973, at 10:00 o'clock in the forenoon thereof, for an order pursuant to Rule 3211(b) CPLR, dismissing the first, second and third complete defenses and the fourth and fifth partial defenses, on the ground that they are insufficient in law on the face thereof, and granting to the plaintiff judgment directing an inquest to ascertain the plaintiff's damages, and for such other or further relief as to the Court may seem just.

PLEASE TAKE FURTHER NOTICE that answering affidavits or papers are required to be served five days in advance of the return date of this motion.

Dated, New York, N.Y.
March 6, 1973

SIDNEY S. BOBBE
Attorney for Plaintiff
36 West 44th Street
New York, N.Y. 10036
MU 2-7218

TO:
WILLKIE, FARR & GALLAGHER
1 Chase Manhattan Plaza
New York, N.Y. 10005

AFFIDAVIT OF FRANK LOWELL IN SUPPORT

- - - - - - - - X

SAME TITLE

- - - - - - - - X

COUNTY AND STATE OF NEW YORK, SS.

FRANK LOWELL, being duly sworn, deposes and says:

1. I am the plaintiff herein and I bring this action to recover damages caused by the defendant's breach of an employment contract made with me on July 3, 1968, by which contract I was employed by the defendant for a period of seven years, until July 3, 1975, as president and general manager at a salary of $35,000. a year, plus a cost-of-living adjustment and plus fringe benefits and a possible bonus. In addition, I was to have the right to be continued after the conclusion of the original period for one year as a consultant at half my salary, with the fringe benefits, but without the bonus.

2. On October 9, 1972, I was abruptly discharged by the defendant, without notice of any kind and without any statement of the cause of my discharge; and my first cause of action is to recover the damages caused by such discharge. My second cause of action is to recover the amount due me up to the time of my discharge as the cost-of-living adjustment which should have been paid to me pursuant to the contract, but which was

never paid, as well as the fringe benefits due me but not furnished during that time.

3. I annex hereto as Exhibit A my complaint and I annex as Exhibit B the amended answer thereto.

4. I annex hereto as Exhibit C a copy of my employment contract and as Exhibit D a copy of the letter informing me of my discharge, which was delivered to me by hand by the Chairman of the Board of Directors of defendant.

5. The amended answer, Exhibit B, sets up separate defenses in an attempt to justify my discharge and this motion is made to strike out those defenses as insufficient in law. I am advised by my attorney that if they are in fact insufficient, there is no reason why judgment should not be granted to me directing an inquest to determine my damages on the first cause of action. As to the second cause of action, which has to do with my claim for the unpaid cost-of-living adjustments, the only question is the amount of damages, to be established on an inquest, because the defendant does not claim to have paid such adjustment to me during the time of my employment, and the separate defenses have no application to that cause of action.

6. Promptly after my discharge on October 9th

last, I attempted to get other employment, and I have been wholly unsuccessful in that quest. Among other things which I have done in a diligent effort to obtain employment, I have registered with the New York State Unemployment Insurance office; I have applied to other employment agencies; I have placed advertisements in newspapers, and I have answered likely newspaper advertisements. I have written letters of application to what I considered likely sources of employment and I have made contacts with friends and acquaintances - all to no avail. In any event, I am advised by my attorney that the defendant has the burden of showing on any inquest that I have obtained other employment or could have obtained it in the exercise of due diligence. The answer herein makes no such claim.

7. I therefore respectfully ask that this motion be granted in all respects and the case set down for inquest.

s/Frank Lowell

Sworn to
March 5th, 1973

AFFIDAVIT OF WILTON B. GIBSON IN OPPOSITION

- - - - - - - - X

SAME TITLE

- - - - - - - - X

STATE OF TEXAS)
SS:
COUNTY OF HIDALGO)

WILTON B. GIBSON, being duly sworn, deposes and says:

1. I am Chairman of the Board of Lem Instrument Corporation, the defendant herein, and am fully familiar with the matters hereinafter stated. I submit this affidavit in opposition to plaintiff's motion for summary judgment.

2. Defendant's Amended Verified Answer asserts affirmatively that plaintiff's employment was terminated for cause, that plaintiff failed to perform duties faithfully and diligently, and that he failed to perform the conditions precedent on his part to be performed. Specifically, the amended verified answer alleges that plaintiff, inter alia, failed:

> "(1) to achieve the level of performance anticipated for Lem in the 'Operation Plans', (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers

> of Lem harmoniously and in the best interests of the Company, and (11) to provide proper leadership for Lem."

A copy of the amended verified answer is annexed hereto and marked Exhibit A.

3. Nowhere in the plaintiff's motion papers are any of these critical failings and shortcomings denied. Nowhere does plaintiff deny that his discharge was for cause or that he failed to "diligently and faithfully" perform his duties. Plaintiff's conspicuous failure to deny these affirmative defenses underscores why his motion for summary judgment should be denied.

* * * * *

6. In this motion plaintiff seeks summary judgment, as against a company which sustained substantial losses for the 4-year period during which plaintiff was its chief executive officer. These actual operating losses aggregate a total of $193,880.77 and occurred for the fiscal year ending in June, as follows: 1969 - $24,149.77; 1970 - $34,547; 1971 - $75,168.00; 1972 - $60,016.00. I submit that this complete lack of success, standing alone, constitutes "just cause" to discharge the person responsible for running the Company while the losses were sustained.

7. In addition, the dismal performance was also way below the always optimistic (but inflated) forecasts plaintiff issued annually. A graph chart reflecting a comparison of the actual sales volume and the volume plaintiff forecast, is submitted herewith and marked Exhibit B. The obvious and vast difference demonstrates the gap between plaintiff's promises and his performance. After four years of failure, discharge was the only prudent course for a company losing large sums of money.

* * * * *

10. Shortly after the acquisition, plaintiff prepared an "Operations Plan" for the future development of Lem. A copy is annexed hereto and marked Exhibit C. A cursory review of this indicates some of the specific objectives Mr. Lowell failed to achieve. Among the stated objectives are: "Direct Sales", "Sales Representatives", "Perform Market Analyses" and "Update Existing Products" and achieve a "$300,000 sales and $50,000 pretax profit."

11. Sales never reached anywhere near $30,000 (Exhibit A), nor did any pretax profits accrue.

* * * * *

22. Plaintiff also asserts that summary

judgment should be granted as to his Second Cause of Action dealing with "unpaid cost-of-living adjustments." He alleges - without explanation - that the affirmative defenses do not apply. But, the Second Cause of Action expressly repeats and realleges the First Cause of Action, and consequently his assertion is obviously in error. In addition, even if plaintiff had not so pleaded, the affirmative defenses would apply and preclude plaintiff from recovering, since he failed to perform the obligations on his part to be performed under the contract. But, plaintiff well knows the other reason why Lem never paid him any "cost-of-living adjustments." Plaintiff, while chief executive officer of Lem, determined in his sole discretion not to pay himself or Mr. Everett, who had an identical employment agreement, or the other Lem employees, any of these "cost-of-living adjustments." (Parenthetically, I believe he did this because he was embarrassed by Lem's large losses and did not wish to further increase them). Obviously, he knowingly and deliberately waived any rights to them and at this late date has no legal interest.

WHEREFORE, it is respectfully requested that plaintiff's motion be denied in all respects.

Sworn to
March , 1973

s/Wilton B. Gibson
WILTON B. GIBSON

REPLY AFFIRMATION OF SIDNEY S. BOBBE

- - - - - - - - X

SAME TITLE

- - - - - - - - X

STATE OF NEW YORK)
SS:
COUNTY OF NEW YORK)

SIDNEY S. BOBBE, attorney for the plaintiff, states to this Court, under penalty of perjury, in reply to the affidavit of Wilton B. Gibson:

1. Mr. Gibson completely disregards the fact that plaintiff's motion is one to dismiss the affirmative defenses as insufficient in law, and therefore no attempt was made by plaintiff, or needed to be made, to go into the factual questions.

2. As shown in plaintiff's memorandum, and not in any way challenged by defendant, it was not the plaintiff's obligation on this motion to deny that he was discharged for cause; it was defendant's obligation both to allege and to prove affirmatively that he was discharged for a legally juntifiable cause. Since the separate and complete defenses fail to allege such a cause, the motion must be granted on the law. The first separate and complete defense must be dismissed because it fails to allege properly plaintiff's failure to perform any express or implied condition precedent.

Dated, New York
March 16, 1973

* * * * *

s/Sidney S. Bobbe
SIDNEY S. BOBBE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

- x

FRANK LOWELL, :

Plaintiff, :

-against- :

LEM INSTRUMENT CORP., :

Defendant. :

- x

October 9, 1973
Riverhead, New York

B e f o r e:

HON. JOHN F. SCILEPPI,

Justice, and a Jury.

- - -

A p p e a r a n c e s:

SIDNEY S. BOBBE, ESQ.,
Attorney for the Plaintiff;
36 West 44th Street,
New York, New York.

WILLKIE, FARR & GALLAGHER, ESQS.,
Attorneys for the Defendant;
1 Chase Manhattan Plaza,
New York, New York;
BY: MARK F. HUGHES, ESQ., and
ROBERT J. KHEEL, ESQ., of Counsel.

MINUTES OF TRIAL

William J. Fugelsang, C.S.R.
Official Court Reporter

THE CLERK: Lowell versus Lum, on trial.

(Roll call of jury.)

THE CLERK: Your Honor, the jury is all present. This jury was sworn on 10/9/73, sir.

THE COURT: Is the jury satisfactory to both sides?

MR. BOBBE: Yes, your Honor.

MR. HUGHES: Satisfactory, your Honor.

THE COURT: You may proceed to open to the jury.

(Whereupon, Mr. Bobbe opened to the jury on behalf of the Plaintiff.)

(Mr. Hughes opened to the jury on behalf of the Defendant.)

THE COURT: Call your first witness, sir.

F R A N K L O W E L L, of 25 Alpine Way, Huntington Station, New York, called to testify in his own behalf, and being first duly sworn by the Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. BOBBE:

THE COURT: Please keep your voice up so that the jury may hear what you say, and so that I can hear you.

THE WITNESS: I'll try, your Honor.

Q Mr. Lowell, you are the Plaintiff in this action, are you not?

A Yes, I am.

Q Will you tell us your education and experience before you entered into the employ of LEM Instrument Corp. in 1968.

A Well, I'm a graduate mechanical engineer with a degree in mechanical engineering from CCNY, which I received in 1944. I spent several years thereafter working in various engineering capacities concerned with the development of, mainly precision instrumentation, mechanical, electronic and optical instrumentation.

As a consequence of those activities, I became chief engineer of a company in Queens, and there I was responsible for supervision of all the research and development and manufacture of precision electro-mechanical devices, some photo optical equipment and nuclear reactor control

instrumentation. As a consequence of my work with that company I was invited to join the Bulova Watch Company as a principal engineer, and as principal engineer, I was responsible for a series of advanced research and development programs in the field of photo optical reconnaissance. That involved the responsibility for the activities of engineers, manufacturing personnel, and the sales function of that particular -- or at least a part of the sales function of that particular division.

After being with Bulova Watch Company for some time, I was asked to rejoin Peerless Instrument Company, which I did, after consulting with my superiors at Bulova Watch Company.

Q Was Peerless Instrument Company the one that you worked for in Queens, which you mentioned?

A Yes, sir. I'm sorry, I neglected to mention their name. So, I returned to Peerless and assumed even additional duties with Peerless in essentially the same kind of business as I had been concerned with during my prior employment with Peerless. This position lasted for about two years, I believe, and at that point in time Bulova Watch Company decided to expand the department with which I had worked with at Bulova into a full division, and I was asked

then to return to Bulova Watch Company, this time as general manager of this newly created division.

Again, I consulted with my employers, and after explaining that this looked like a real boost upward in my career I returned to Bulova Watch Company and for the next four to five years I was general manager of this newly created division which was concerned with research and development of special aerial cameras and related equipment, primarily for the Armed Forces and other government agencies.

The division was operated as a fully autonomous division. By that I mean I operated it as if it were a separate activity responsible for all the marketing, the engineering, the manufacturing and finance to the extent that it was operated as a profit center, and I continued very happily in that position, and there came a time in the affairs then of Bulova Watch Company when it was decided that the company would not pursue research and development work of that type.

Now that affected the activities of the division which I managed as well as three, perhaps, four other similar divisions engaged in other types of research and development work. And so, the general managers of these divisions, including myself, were asked to gradually terminate

the business of research and development, and I was offered a position elsewhere in the Bulova Watch Company.

I remained with the job, concluding the affairs of the division. It took perhaps, seven or eight months to do so, and then I decided that I would not accept the other position with Bulova Watch Company and instead I left the company with a view towards going into business for myself.

In searching about for a vehicle by which I might do this, I met the -- I believe he was the Vice President at that time; he was not President of it -- a company called Warner Electric Brake and Clutch Company, in Beloit, Wisconsin.

I learned that this company owned and operated a subsidiary company on Long Island which was doing very poorly, and it was loosing a great deal of money. It had all kinds of technical problems, and they were most anxious to have someone like myself join them and help them turn this operation around.

I then, therefore, abandoned my idea of going into business for myself and went to work for Warner Electric Brake and Clutch Company, employed as general manager of their subsidiary on Long Island, and I was given the assignment to turn this company around from a serious loss position to a profitable position.

Well, shortly after I joined Warner, Warner acquired a second subsidiary in Massachusetts, and I was asked if I could at the same time that I was managing the Long Island subsidiary, manage the one in Massachusetts. And, I agreed that I would do that, and for the next two years I spent my time partly in New York and partly in the Boston area, and I managed those both companies concurrently.

I very quickly was able to find the things wrong with the company here on Long Island and turned it around to the point where it was going into a highly profitable activity. It took a little longer with the Boston operation, which was also having problems, but finally, that turned around.

Well, the operation at Long Island became so successful that the management of Warner Electric decided that this might be a good time for them to pull out, to sell it and get out of it while they could come out with a good return. And so, they did sell the assets of Warner Electric, and when I inquired what was the plan for the subsidiary in Massachusetts, I was told that that would probably be moved out to the Mid-west. However, I was assured that I, if I wanted to, I could either consider a position in the Middle West, or alternatively, I was offered, definitely offered a position with the company

that purchased the assets of this company on Long Island which I had been managing.

Well, I considered those options and decided instead to return to my earlier idea of going into business for myself, and so I left the employ of Warner Electric Brake and Clutch Company after cleaning up the affairs that were necessary, and decided I would go into the photo optical business.

I had some ideas for a microfilm camera accessory, and in speaking to people about it, two of the people who worked with me, who were under my direction, I should say at this Long Island subsidiary of Warner, they indicated that they were not at all happy about the turn in events, the new ownership, et cetera, and that they were planning to leave their jobs, and that they would be interested in joining me in a venture if I got one going.

Well, some weeks later they both informed me that they had in fact resigned their jobs and that they were still interested in joining with me. So, the three of us got together and we organized LEM Instrument Corp.

Q Who were the other two?

A The other two individuals were Robert A. Everett and Joseph Meely, both of whom, as I say, were

individuals who reported to me at this Long Island company which I had been managing. And, our intention, as I believe I said, was to continue the development of this microfilm accessory device and to manufacture and attempt to sell it to microfilm camera users.

Shall I go on from that point, Mr. Bobbe?

Q Yes.

A Well, we had no sooner decided to form our business -- in fact, we hadn't even been chartered by the State as a corporation when I received a telephone call at home from a company in California called Leach Corporation. Now, Leach Corporation was the company that manufactured tape recorders which were a vital part of the reentry portion of the Apollo missions. Now, these tape recorders are used to record data during that period of time when radio communications are blacked out, and during the time that I had been managing this company in Long Island the name of this company was Guidance Controls.

Guidance Controls had developed some special clutches, electromagnetic clutches to be used in this particular tape recorder, and as it turned out, at the time that LEM, our company was organized, those recorders had failed to pass some tests that had recently been performed on them

because the specifications for the recorders had been changed, and as a consequence, the recorders would not operate under these new specifications. To put it briefly, the difficulty was traced to the clutches and brakes which I had been involved with with Leach Corporation, that is, which Guidance Controls had designed and manufactured under my supervision.

So, Leach Corporation had gotten back to the new owners of this company and asked them for assistance in solving the problem that they had, and Leach and the entire Apollo program were slowed down, and the delays represented many millions of dollars I was told later on, in penalties and what have you. In any event, the new owners of this Guidance Controls operation were unable to solve the problem for Leach and so, in desperation, these engineers from Leach had called me at home --

MR. HUGHES: Your Honor, I don't want to interrupt, but --

THE COURT: This is part of his background. I don't think we have to go into every phase of his employment and what he did, however, for each company. Bring it down to the agreement here.

Q Now th , when Mr. Everett and Mr. Meely joined

you, was that the same time that LEM Instrument Corporation was formed?

A Yes, sir.

Q And that was in what year?

A That was in 1965.

Q And you were the president of that corporation?

A Yes.

Q And was Mr. Everett the secretary?

A Secretary and vice president.

Q Did Mr. Meely subsequently leave the corporation?

A About a year after we formed the corporation he did leave.

Q And was the ownership of the corporation in the end of the year 1967 in you and Mr. Everett alone?

A The end of 1967, yes.

Q Did you at that time, in December of 1967, communicate with Twin Discs, Inc.?

A Yes, I did.

Q And with what purpose?

A Well, Mr. Everett and I had come to the conclusion that our future was promising, but that --

MR. HUGHES: Your Honor, I object to

that.

THE COURT: Sustained.

What did you do after that, if anything?

Q -- in your communications?

A I wrote a letter addressed to Mr. Batten, informing Mr. Batten --

THE COURT: Who is Mr. Batten?

THE WITNESS: Mr. Batten is the president of Twin Discs, Inc.

Q John --

A John H. Batten.

Q Go on.

A Informing him of -- in general outline of the history of LEM Instrument Corporation and indicating that we, the owners of LEM, would be interested in pursuing the possibility of a business alliance.

MR. HUGHES: Your Honor, as I understand the witness, he's telling us what he wrote in a letter?

THE COURT: Yes. If you have an objection, sustained.

Q After you wrote to Mr. Batten, did you hear from him?

A Yes. He telephoned me.

Q And did he send any representative to see you?

A Yes. Shortly after he telephoned me, he sent Mr. Gibson to visit with us at LEM.

Q Who is Mr. Gibson? What is his full name?

A Mr. Wilton B. Gibson, who at that time was, I believe, either sales manager or had just been promoted to the position of Vice President for Corporate Development.

THE COURT: Of Twin Discs?

THE WITNESS: Of Twin Discs, yes, sir.

Q Did negotiations continue from that time on until early in July of 1968, with Twin Discs?

A Yes.

Q On July 3, 1968, was there an agreement made between you and Mr. Everett on one side and Twin Discs, Inc. on the other, for the exchange of stock by you and Everett for stock of Twin Discs, Inc.?

A Yes, there was.

Q Is this the agreement which was made? (Handing document to witness)

A Yes, sir.

MR. BOBBE: I offer it in evidence.

MR. HUGHES: No objection.

THE COURT: Let it be marked.

*****

(Document above referred to was marked Plaintiff's Exhibit 1 in evidence as of this date.)

BY MR. BOBBE:

Q On the same date, July 3, 1968, was this document entitled Employment Contract signed by you, as president, and Mr. Everett as vice president and secretary?

A Yes, sir.

Q And was there attached to that Employment Contract the document now attached to it signed by Wilton B. Gibson as vice president of Twin Discs, Inc.?

A Yes.

MR. BOBBE: I offer both documents as one Exhibit, your Honor.

MR. HUGHES: No objection.

THE COURT: Let it be marked.

*****

(Documents above referred to were marked Plaintiff's Exhibit 2 in evidence as of this date.)

MR. BOBBE: May I have permission to read this to the jury, your Honor?

THE COURT: Yes.

(Whereupon, Mr. Bobbe read from Plaintiff's Exhibit 2 in evidence to the jury.)

MR. HUGHES: Your Honor, may I ask that Mr. Bobbe stipulate that the contract which he has referred to is not in suit in this action?

MR. BOBBE: Which contract do you mean? The guarantee here?

MR. HUGHES: Yes.

MR. BOBBE: Yes.

MR. HUGHES: That's not involved in this action at all.

MR. BOBBE: We are not suing on that guarantee in this action, that's right.

MR. HUGHES: And may I also, your Honor, call the jury's attention to schedule A which Mr. Bobbe did not call their attention to, which is at the end.

MR. BOBBE: Well, I called attention to the text of it.

MR. HUGHES: Yes, but I wanted to call attention to the whole thing.

THE COURT: You may do so.

(Whereupon, Mr. Hughes read from Schedule A of Plaintiff's Exhibit 2 in evidence.)

BY MR. BOBBE:

Q Mr. Lowell, you just heard Schedule A being read. Were you told what the purpose of that schedule was?

A Yes, I was.

Q By whom?

A By Mr. Howell, who prepared it.

Q And what did he tell you?

MR. HUGHES: I object to that?

THE COURT: Sustained.

Q All right. Now, during the negotiations leading up to the execution of this contract, did you report to anyone the extent of your previous experience as you have testified to here today?

A Yes, I did.

Q To whom?

A Well, first to Mr. Gibson and then at later meetings and other times with various other officers and management employees of Twin Discs. It was Mr. Batten, Mr. Howell, Mr. Adamson, Mr. Schirtz, Mr. DeLong, and several other people whose names I don't immediately recall.

Q About how many meetings did you have with the

various officers and directors of Twin Discs prior to the execution of these agreements?

A Well, the meetings extended over a period of about six months, and I would say that there were at least a dozen and possibly a dozen and a half such meetings at various times.

Q At the time of the closing of the signing of these contracts, were you presented with this document (Indicating)?

A Yes, sir.

Q And whose signature appears at the bottom as the secretary?

A R. T. Howell.

MR. BOBBE: I offer that in evidence.

THE COURT: She it to your adversary.

MR. HUGHES: No objection.

*****

(Document above referred to was thereupon marked Plaintiff's Exhibit 3 in evidence as of this date.)

MR. BOBBE: May I read portions of this to the jury, your Honor?

THE COURT: Yes.

(Whereupon, Mr. Bobbe read from Plain-

tiff's Exhibit 3 in evidence to the jury.)

BY MR. BOBBE:

Q Now, Mr. Lowell, after these agreements were made, did you continue to act as president and director of LEM Instrument Corporation?

A Yes.

Q Did Mr. Everett continue to act as secretary and vice president?

A Yes.

Q And do you know whether he received a contract of employment as part of the same transaction?

A Yes, he did.

Q At that time, what was the extent of the business of LEM Instrument Corporation, the nature and extent?

THE COURT: Excuse me. Did you say Mr. Everett continued as what?

MR. BOBBE: Secretary and vice president.

THE COURT: Thank you.

MR. BOBBE: And director.

Q Is that right?

A Yes, that's correct. And I might add that I was also treasurer, in addition to being president and

director.

Q Now, after the acquisition -- after the making of these agreements, was there a change made in the bylaws as to the number of directors to serve on the Board of Directors of LEM Instrument Corporation?

A Yes, there was.

Q And what was that?

A Well, I believe the original bylaws were first completely amended, and then the amended bylaws provided for only five directors, so there was a further amendment to increase that number of directors of LEM to six.

Q At the time of the acquisition or immediately thereafter, were there five directors?

A Yes, sir. There were.

Q And who constituted the other three directors besides you and Mr. Everett?

A It was Mr. John H. Batten, president of Twin Discs, Mr. W. B. Gibson, the vice president of Twin Discs, and Mr. R. T. Howell, vice president and secretary of Twin Discs.

THE COURT: And you and Mr. Everett, right?

THE WITNESS: Yes, sir.

THE COURT: And after the bylaws were amended, the bylaws gave Twin Discs the privilege of designating an additional director, is that correct?

THE WITNESS: That is correct.

THE COURT: And you and Everett remained as directors?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. BOBBE:

Q Now --

THE WITNESS: Excuse me. May I add that Twin Discs did exercise that privilege and did add another director.

THE COURT: Yes, six.

THE WITNESS: Yes.

THE COURT: I mean, altogether.

THE WITNESS: Yes. I haven't named him though, your Honor.

THE COURT: Four designated by Twin Discs, and you and Everett.

THE WITNESS: Yes, sir.

Q And who was the fourth director?

A Mr. Donald E. Beaton, vice president of Twin Discs.

Q I show you this paper and ask you to tell us what that is.

A This is a copy of the restated bylaws of LEM Instrument Corporation.

Q Are those the bylaws that were adopted immediately after the acquisition by Twin Discs?

A Shortly thereafter.

MR. BOBBE: I offer that in evidence.

MR. HUGHES: No objection.

THE COURT: Let it be marked.

***** (Copy of restated bylaws of LEM Instrument Corporation marked Plaintiff's Exhibit 4 in evidence as of this date.)

BY MR. BOBBE:

Q Now, was the amendment increasing the Board of Directors to six subsequent to this revised bylaws that you have just put in evidence?

A Yes, it was.

MR. BOBBE: I would like to read from that to the jury, your Honor, but first I'll ask the witness another question.

Q Who was elected as Chairman of the Board immediately after the adoption of these bylaws or immediately after the acquisition of the stock?

A It was Mr. John H. Batten.

Q He was first elected Chairman of the Board?

A Yes.

Q And was he later replaced by someone else?

A At his request he stepped down, and Mr. Gibson was elected Chairman of the Board of Directors.

MR. BOBBE: Now, I would like to read to the jury, your Honor, the provisions of the bylaws as to the duties respectively of the Chairman of the Board and the President.

THE COURT: All right, sir.

(Whereupon, Mr. Bobbe read from Plaintiff's Exhibit 4 in evidence to the jury.)

BY MR. BOBBE:

Q I show you this pamphlet and ask you to tell us what this is.

A Yes. This pamphlet is a catalog of the products which LEM Instrument Corporation had designed and was attempting to market at the time of the acquisition of LEM Instrument by Twin Discs.

Q And what was the principal product, or what was the product?

A The product was a line of precision electromagnetic clutches and brakes.

MR. BOBBE: I offer that into evidence.

MR. HUGHES: May I have a moment, your Honor?

THE COURT: Yes.

MR. HUGHES: May I see Exhibits 1 and 2, please?

THE COURT: Yes.

MR. HUGHES: Your Honor, I have no objection to this one if it's offered as part of Exhibit 1, so I suppose I shouldn't object to it when it's offered all by itself.

THE COURT: It's part of 1? Do you need it again?

MR. BOBBE: No, I don't really.

THE COURT: Well, withdraw it.

MR. BOBBE: I'll withdraw it.

BY MR. BOBBE:

Q At the time of the acquisition, did you have

any orders on your books for the sale of the precision clutches and brakes?

A I'm not certain whether we had any orders at the time of the signing of the agreement, if that's what you mean by the acquisition, Mr. Bobbe. Certainly immediately prior to that time we had had no orders on the books for some months.

Q And was that fact communicated to Twin Discs?

A Oh, yes. They were quite familiar with our affairs.

Q And did they have their accountant go over your books and accounts before they signed the agreement?

A Yes, they did.

Q Did they have their attorney draft the agreements?

A Their attorney drafted all agreements, yes.

Q And what was his name?

A Mr. Richard Gibbs.

Q Did you continue the business of marketing or trying to market the miniaturized clutches and brakes after the acquisition?

A Yes, we did.

Q And were you successful in that regard?

A Only to a very limited degree. We had some sales, but no substantial sales.

Q I think you testified that the miniaturized clutches and brakes were used largely in the Apollo program, is that correct?

A And similar programs in the aerospace business, yes.

Q And did something occur with reference to the aerospace industry that affected your business in any way?

A Well, I should say so. The aerospace business completely collapsed throughout the country, and I'm sure everyone will recall that companies in that business were hard pressed for business, and certainly, we as suppliers were hit the hardest.

Q Did you advise the other directors of that situation?

A I kept them informed, certainly. They told me that of their own knowledge they understood what the circumstances were in the aerospace business.

Q Did you announce any plans for other products to be manufactured and developed by LEM Instrument Corp.?

A Yes, I did.

Q And did you discuss that with the other directors?

A Yes, I did.

Q Did you have regular meetings of the Board of Directors?

A We had quarterly formal meetings and additional meetings on an informal basis.

Q And did Mr. Gibson particularly participate in communicating with you and you communicating with him?

A Quite regularly, yes.

Q And did he come to New York for that purpose on many occasions?

A Yes, he did.

Q And did you prepare monthly reports and financial statemnnts which were communicated to the directors?

A Well, LEM's ~~accounts~~ (accountant) prepared the financial reports which I transmitted monthly to the other directors of LEM Instrument, and in addition, I submitted my own report of affairs and activities of LEM to the directors of LEM Instrument.

Q By whom were the minutes of the Board of Directors' meetings signed?

A By the Chairman of the Board which for most of the time was Mr. Gibson, and the secretary of LEM Instrument, Robert A. Everett.

Q Will you tell us what activities you participated in in connection with any change in your ~~produce~~ products that you prepared to market after it appeared that you were being stymied in your efforts to sell the clutches and brakes?

A Well, I decided that after discussions with Mr. Gibson and various other directors at LEM, that that would be an appropriate time for LEM to undertake the development of a line of shaft encoders. LEM had done some small amount of shaft encoder business in the past and one of the directions that I thought the company could grow best in would be with a product of shaft encoders, and so we undertook at that point in time, when our other business was virtually nil, to develop a line of shaft encoders and related equipment.

Q Will you describe to his Honor and the jury what a shaft encoder is?

A Well, a shaft encoder is an electromechanical instrument which measures the position of a shaft in a machine and produces a set of electrical signals, depending upon the position of the shaft, so that these signals can be fed either to a computer or a computer-like device in order to first monitor the position of this shaft, and secondly, to provide a means for controlling further motion of this shaft. It is, if you will, a translating element between the world

of machines, moving machines, and the world of computers.

Q In the course of your attempts in this direction, what exactly did you do as president and general manager of LEM Instrument Corp.?

A Well, it was shortly before this decision was made I had engaged the services of a man who had experience with shaft encoders. He had previously worked under me at another company, and --

Q What was his name?

A His name was Joseph Samuel, and in speaking with Mr. Samuel about my ideas for LEM's entry into the encoder market, he disclosed to me that he had just about that point in time hit upon an idea for a means of building a different improved type of encoder, and he described the idea to me. And, I --

THE COURT: How do you spell that?

THE WITNESS: E - n - c - o - d - e - r.

A (Continuing) He explained his idea to me, and I thought it was an excellent idea, and so I told him that I thought that we at LEM should undertake to expand this idea and develop it into a product line. And so, I undertook to work with Mr. Samuel and with Mr. Everett who contributed in

the manufacturing of the parts at least to develop this new type of shaft encoder.

Q Did you have any other employee with you at that time, after the acquisition?

A Oh, yes. I think at that point in time that I just referred to we had working with us at LEM a Mr. Gay.

MR. HUGHES: Your Honor, I'm not sure that the time has been fixed.

MR. BOBBE: Well, I said at the time of the acquisition.

MR. HUGHES: All right.

THE COURT: At the time that the stock of LEM was taken over by Twin Discs?

MR. BOBBE: Yes.

THE COURT: That's the time you are talking about?

MR. BOBBE: Yes.

THE COURT: And that was July 3, 1968.

BY MR. BOBBE:

Q Was it around that time that Mr. Gay was employed by you or --

A Well, excuse me. I thought we were talking about a time a few months after July when the aerospace

business throughout the country collapsed. Mr. Gay --

MR. HUGHES: That's what I thought the witness was talking about.

THE WITNESS: But just a few months after July --

THE COURT: A few months after, all right. Go on.

Q And you and Mr. Samuel and Mr. Everett worked on the development of this new idea for a shaft encoder, is that correct?

A And other related devices, yes.

Q Now, was there anything novel about the shaft encoder that you were working on?

A Well, yes. Both Mr. Samuel and I had previous experience with shaft encoders, and we both felt that it was novel, and so I asked Mr. Samuel to write out a Disclosure of Invention which we then submitted to a patent attorney, and the patent attorney filed applications for patents in both the United States and various foreign countries.

Q And who recommended the patent attorney?

A It was Twin Discs' patent attorney.

Q And did they recommend him to you?

A Yes, they did.

Q Did you have anything to do with the preparation of these three pamphlets I now hand you?

A Yes, I did.

Q Will you just describe them briefly, what each one of those is?

A Yes. Well, this blue, red and black one is a catalog describing the characteristics of the LEM Instrument Corporation line of absolute shaft encoders, and related digital displays.

MR. BOBBE: I offer that in evidence.

MR. HUGHES: Your Honor, may I ask one or two questions --

THE COURT: Yes.

MR. HUGHES: (Continuing) -- before deciding whether to object?

VOIR DIRE EXAMINATION

BY MR. HUGHES:

Q Mr. Lowell, who prepared this document which was handed to me and which concerning you just testified?

A Well, I did most of the preparation. Mr. Samuel assisted me and then we retained the services of a commercial artist to put it in that format.

Q When was this prepared?

A That was prepared shortly after we completed the development of the first series of shaft encoders and displays, which would have been sometime toward the middle part of 1970, I believe. I'm not certain of that date.

THE COURT: What do you call that, a brochure or something?

THE WITNESS: Yes, sir, or a short-form catalog.

MR. HUGHES: No objection.

****

(Catalog was marked Plaintiff's Exhibit 5 in evidence as of this date.)

THE COURT: Is this the product that you say you engaged an attorney for the purpose of having a patent filed?

THE WITNESS: Yes, for the encoder part of that product.

THE COURT: I see. All right.

MR. BOBBE: May I just show this to the jury, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. BOBBE: (Continued)

Q Before that, is this a fair representation on

the cover of the nature of the shaft encoder?

A Yes, the one in the upper left hand part of the representation is a shaft encoder, one of many described in that bulletin, and the device with the numerals is a fair representation at least of the front panel of the digital display.

MR. BOBBE: I hand this to the jury, your Honor.

(Submitting document to the jury.)

THE COURT: I think you can go on, counselor.

MR. BOBBE: All right.

MR. HUGHES: Your Honor, may we have a stipulation -- I think we can -- that Mr. Samuel was the inventor of the shaft encoder?

MR. BOBBE: Oh, yes, in the application for the patent.

MR. HUGHES: I'm not talking about the application. He was the inventor, wasn't he?

MR. BOBBE: I'll come to that.

BY MR. BOBBE:

Q In the application for the patent, Mr. Samuel was listed as the -- was stated to be the inventor, is that

right?

A That's right.

Q And was that a true statement?

A As far as I knew he was the inventor, yes.

Q And what did you contribute to the final product besides the original invention?

A Well --

MR. HUGHES: Well, I'm not sure -- objection, your Honor.

Q Did you contribute anything?

A Yes, I did.

Q What did you contribute?

A Well, I guided Mr. Samuel and by my own efforts converted this idea into a tangible, marketable product.

Q Did you consult with the patent attorneys from time to time?

A Yes, I handled all that as it became necessary.

Q Did you have anything to do with preparing the claims of invention that were submitted to the patent office?

A Yes, I did. I worked directly with the patent attorney.

Q Did you choose the language or select the

language of the claim or advise the patent attorney of your suggestions?

A In many instances that was the case, yes. The patent attorney was unfamiliar with this type of device.

Q In connection with this shaft encoder, was a knowledge of electronic devices required?

A Yes, sir.

Q And did you have that knowledge?

A Yes, sir.

Q Was there also a knowledge of mechanical features required?

A Yes, sir.

Q And did you have that knowledge?

A Yes, I did.

Q After the preparation of this brochure, what was done with it?

A Well, I immediately arranged for the placement of advertisements in a number of technical trade magazines and journals advertising the availability of this product, and of this brochure, and as requests for further information were received, I sent the catalogs, that brochure if you will, to the inquirers.

Q About how many of those were distributed, if

you recall?

A Well, over the period of two years or so that followed the preparation of that brochure I dare say through that means and various other means, such as direct mail, I must have mailed 8,000 to 9000 of them.

Q You mentioned direct mail. What was your reference to direct mail?

A Well, in addition to the advertising, I also resorted to the use of direct mailing. I purchased a list from a technical magazine, of their subscribers. The list consisted of people who at one time or another had expressed an interest in shaft encoders, that is, had expressed an interest to the magazine by various inquirers. In addition, I arranged for a series of new product publicity releases to be sent to various magazines announcing the availability of this product, and as these releases were printed in the magazines, various potential users inquired, and they, too, were sent copies of this brochure.

MR. HUGHES: Your Honor, there are references here to news releases and writings. May we not have them produced?

THE COURT: Where are they?

MR. BOBBE: Well, your Honor, we

haven't available to us the records of the --

THE COURT: Pardon?

MR. BOBBE: We do not have available to us the records of LEM Instrument Corp. The Defendant has them. If they are available, I would be glad to see them.

THE COURT: Well, did you keep any copies of them?

THE WITNESS: No, sir. I did not.

THE COURT: Of the ads and of the announcements that you say were sent to magazines for printing?

THE WITNESS: Well, I kept copies in the files of LEM Instrument Corporation, not in my personal file.

THE COURT: Were they left with the company?

THE WITNESS: Yes, they were.

THE COURT: Objection overruled -- if any.

BY MR. BOBBE:

Q Did you also prepare the other documents that are in your hand?

A Yes. I again did the preliminary work and wrote the text, determined the layout, and ineach case arranged for a commercial artist to put it in the final form.

Q Will you describe the first of those that you have in your hand?

A Yes. The first is a short single page description of, a technical description of a shaft encoder and display system of a particular type which we designated by calling it Model EDS-170.

Q And was that developed during the time that you were president?

A Yes, sir. It was.

Q And did you have any part in the development of that article?

A A very large part, yes.

Q And what did you do in that respect?

A Well, I contributed to the engineering and the design, and supervised the activities of other people who made such contributions.

Q What was Mr. Everett's duty in addition to acting as secretary and vice president in connection with the work of the business?

A Well, he had primarily one other duty,

although he did other things as well. His main responsibility was to attend to the manufacture of the individual parts and the assembly of the devices which we manufactured at LEM Instruments.

THE COURT: He was the production man, is that right?

THE WITNESS: He was the production man, yes, your Honor. In addition, he arranged for the purchasing of standard materials and other items that we might need in the running of the business, and when there wasn't enough work of that type to keep him occupied, he assisted me by making engineering drawings under my supervision.

Q Did you make engineering drawings yourself?

A Some, yes.

MR. BOBBE: Let me have that first paper that you described, please. I offer that in evidence.

MR. HUGHES: May I, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. HUGHES:

Q Mr. Lowell, where did you get this?

A Where did I get it?

Q Yes.

A I had it in my possession at home.

Q Is that true of the other exhibit, Exhibit number 5?

A Yes.

MR. HUGHES: No objection.

THE COURT: Mark it.

*****

(Brochure above referred to was marked Plaintiff's Exhibit 6 in evidence as of this date.)

MR. BOBBE: May I pass that to the jury, your Honor?

THE COURT: Yes, but continue. They can look at that and listen to the testimony.

MR. BOBBE: All right, your Honor.

BY MR. BOBBE:

Q And what is the next paper that you have there?

A Well, this is a bulletin describing a digital comparator and control module which we designated as Model DCM-270. This describes an instrument which is intented to be used in conjunction with the shaft encoders and displays

we manufactured at LEM, to provide users with a means for controlling the position of a part of a machine.

MR. BOBBE: I offer that in evidence.

VOIR DIRE EXAMINATION

BY MR. HUGHES:

Q Mr. Lowell, was this document prepared subsequent in time to the other two documents that have been marked?

A Yes, it was.

Q Which of the documents was prepared first?

A The blue one.

Q The larger --

A The four-page blue one.

Q And the comparator, that's a different thing from an encoder, is it not?

A It's intended to be used with an encoder.

Q But it's not an encoder, is it?

A Well, in fact it is, of a different type. It's not an encoder of the type that we describe in our other brochure.

MR. HUGHES: No objection.

***** (Brochure above referred to was marked Plaintiff's Exhibit 7 in evidence as of this

date.)

MR. BOBBE: May I pass that to the jury, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. BOBBE: (Continued)

Q Did you participate in any way in the preparation of that last exhibit that was offered in evidence?

A Yes, I did most of the preparation except for the art work which was done by a commercial artist.

Q And were all three printed documents distributed in the same general way as you have described with regard to the first?

A Yes. As the successive ones became available every inquiry would be answered by the mailing or forwarding at least of whatever such literature we had.

Q Did you have any advertising agent?

A Yes, we did.

Q Who was that?

A That was Adrian E. Clark, Jr., Inc., in Jericho, New York.

Q Did they place the advertising, prepare and place the advertising for you?

A They worked with me on the preparation. Again, I would generally write the text, and they would perform the layout work, and they arranged for the placement of all the advertisements.

Q Now, were these products manufactured and kept in inventory in substantial quantities?

A Not in substantial quantities, no, sir.

Q In what quantities were they kept?

MR. HUGHES: I'm sorry, but I didn't hear that first question. Would you mind repeating it?

(Whereupon, the last question was read by the reporter.)

THE WITNESS: Well, most of the products that are described in the blue brochure were not kept in inventory. The blue brochure offers the user or purchaser of this equipment a large number of different options and possible combinations of features, and so it was not feasible to keep finished units in stock in inventory. We did maintain a modest inventory of some of the EDS-170 systems described in the second brochure. We

had no finished units to my knowledge except perhaps one or two of the comparator in stock.

Now, we did maintain in inventory some of the parts necessary for making any of the units we advertised.

BY MR. BOBBE:

Q Did you receive communications from prospective customers in response to your advertisements and your brochures?

A Oh, yes, many such.

Q What would happen when you received a communication?

A Well, it depended upon what kind of communication was received. Most of the communications resulted from the interested customers seeing our advertisement in a magazine and requesting of the magazine that we, the advertiser, be informed of his intent. This is the general procedure in technical magazines, and so when we received a listing of such inquiries from the magazine I would then mail our catalog information to the inquirerer.

Other times the advertisement or publicity release would result in a direct inquiry being made to LEM either by a telephone inquiry or a written inquiry. If the

inquiries were for information, I would certainly immediately arrange for the mailing of our catalogs. If the inquiry was more specific, sometimes, it would result in the immediate quotation. Sometimes it would result in my writing a letter to the inquirerer. Sometimes, I would respond by a telephone call and try to clarify what it was that the inquirerer was interested in.

THE COURT: Gentlemen, and members of the jury, we will take a five-minute recess at this point.

Don't discuss the facts of the case during the recess, members of the jury. Keep an open mind on all the evidence until you hear all of the evidence and the case is presented to you for deliberation.

In other words, forget about the case at this time. We will send for you shortly.

(Whereupon, a recess was declared.)

(After the recess the jury returned to the Courtroom, and the following occurred;)

BY MR. BOBBE:

Q Mr. Lowell, did you at any time attempt to get any sales representatives to help you in making sales of your

products?

A Yes, I did.

Q What efforts did you make in that direction?

A Well, I regularly advertised in a trade journal for sales representatives. As a consequence, I received letters of inquiry from many dozens, perhaps even hundreds over the period of several years that I did this, and I followed these inquiries up where it seemed appropriate, with telephone conversations, personal interviews, various other kinds of correspondence, and attempted to interest qualified sales representatives in taking on the LEM Instrument line.

Q Were you successful in this endeavor?

A Well, from time to time we found compatible sales representatives, and we did have sales representatives.

Q At what period of time was that?

A Well, we had sales representatives even before LEM Instrument was acquired by Twin Discs. We had, I believe, one, perhaps two at the time of the acquisition, and then over the ensuing four years, we had, perhaps five or six all told, and at the time that I was discharged we had two.

Q And that occurred about October 9, 1972?

A Yes, sir.

Q Did you on occasion call, make personal calls on any customers or prospective customers?

A Oh, yes. I did that. As the contact with customers reached the point where it seemed that such calls were necessary either to clarify some technical points, or in order to convince the customer that purchasing equipment from us was the right thing to do for his needs, I would go out and personally call on customers. I called on a fair number of customers over a period of years that way.

THE COURT: How many?

THE WITNESS: Well, I don't recall the exact number.

THE COURT: Approximately.

THE WITNESS: Iprepared a list though from my recollection --

THE COURT: Approximately how many?

THE WITNESS: Approximately? I'd say approximately fifty.

THE COURT: All right.

BY MR. BOBBE:

Q You say you prepared a list of customers that you called on?

A Yes, in connection with the examination before this trial, I prepared such a list.

Q And that was a list of customers that you called on subsequent to the acquisition of the stock by Twin Discs?

A Yes.

Q I show you the paper and ask you if that is the list of the customers that you called upon during that time.

A This is a list I prepared from memory. I don't believe it's a complete list by any means, but without access to the records, that was the best I could do.

MR. BOBBE: I offer it in evidence.

THE COURT: Without asking your adversary to concede the truth of it?

MR. BOBBE: That's right. Without asking my adversary to concede the truth of it.

MR. HUGHES: Well, I object to it as irrelevant, immaterial and incompetent, and without a proper foundation.

THE COURT: Well, that's a proper objection except that it might shorten the

trial if you concede that that's what he would testify to, without conceding the truth of the statement.

MR. HUGHES: Well, I will make that much of a concession, your Honor.

THE COURT: All right. This exhibit then is taken in evidence with the reservation that the Defendant does not concede the truth of the testimony of this witness that he interviewed personally these customers. That's a question of fact for the jury to decide.

It may be marked.

*****

(Document above referred to was marked Plaintiff's Exhibit 8 in evidence as of this date.)

MR. BOBBE: May I show that to the jury, your Honor?

THE COURT: Well, you may show it to them, but they will have all the exhibits in the jury room later.

MR. BOBBE: All right, your Honor.

BY MR. BOBBE:

Q Mr. Lowell, did you ever call on customers

cold? That is, just --

MR. HUGHES: What was that?

THE COURT: Cold, c - o - l - d.

A Well, I made some of those calls in the company of Mr. Gibson and some of those calls were cold in the sense that I had not made any prior arrangements.

Q Did you get any orders as a result of those calls?

A Well, I can't really recall exactly. One of the companies that I called on --

MR. HUGHES: Now, your Honor, that's his answer, I submit.

THE COURT: No. Did you get any of those customers? That's the question.

THE WITNESS: The cold customers? The ones I called on in Mr. Gibson's company?

Q Yes, or otherwise.

A Oh, or otherwise. Certainly, yes, but as far as cold calls, I wouldn't -- I don't recall any. Now, there was one customer I called on with Mr. Gibson. I had subsequent contacts with that customer, and we did finally receive an order from that customer, well over a year after the initial call.

Q Apart from that, do you recall any other orders that you got as a result of any call without any prior request?

A No, and it would be highly unlikely because of the nature of our product.

MR. HUGHES: I object to that and move to strike the answer.

THE COURT: Yes. The answer is no. Strike out the balance of the answer. The jury will disregard it.

Q Is there any reason why you found, in your experience, that it would be -- well, did you find that it was, in your experience and opinion, useless to call on customers cold?

MR. HUGHES: I object to the form of that question.

THE COURT: Sustained as calling for a conclusion.

Q Well, at the time that this contract was negotiated, made, did the question of the length of term of your employment ever come up in discussion with either Mr. Batten or Mr. Gibson, or Mr. Howell?

A Yes, with all three of them.

THE COURT: Before it was signed?

I want to get that straight.

THE WITNESS: Yes.

THE COURT: Before it was signed? Well, the contract provides for seven years, doesn't it?

MR. BOBBE: I know. I'm asking whether there was any discussion as to why there was a seven-year contract.

MR. HUGHES: Well, I object to that, your Honor.

THE COURT: Sustained. The contract speaks for itself. All the terms are incorporated therein.

MR. BOBBE: Well, this is not an effort, your Honor, to vary the terms, but to merely show why the seven-year term was provided for.

THE COURT: What difference would it make? You are suing on a seven-year contract.

MR. BOBBE: All right. Perhaps your Honor is right in that respect.

BY MR. BOBBE:

Q Now, what were your relations with customers

who you did sell? Were they friendly or unfriendly?

MR. HUGHES: Well now, I object to the form of that question.

THE COURT: Yes. That calls for a conclusion, too.

MR. HUGHES: Fix the time and the place and the customer.

Q Did you have any difficulties with customers?

MR. HUGHES: I object to that, your Honor.

THE COURT: Sustained. You have to be more specific than that, Mr. Bobbe.

Q Were your relations with your customers harmonious or otherwise?

MR. HUGHES: I object to that, your Honor.

THE COURT: Sustained.

Q Had there been any disputes with customers during the term of your employment?

A Nothing that I would describe as disputes. In a commercial enterprise --

MR. HUGHES: Your Honor, I object.

A (Continuing) No, there were no disputes.

Q Now, was there some difficulty with a company known as Machine Tool Electronics?

A There was a business problem with Machine Tool Electronics, yes.

Q What was that?

A Machine Tool Electronics was a company that had purchased some of LEM's encoders and had had difficulty in applying the encoders. They had returned the encoders to us, to LEM, for repair on two or three occasions. In each instance, we repaired the encoders at no cost, no charge to the customer, even though the difficulty was traceable to their errors and there finally came a point in time where Machine Tool Electronics said that they could not use the encoders in the application they had anticipated using them, and they asked that LEM accept the encoders and refund the purchase price. This was about a year, I believe, after the units had been first shipped to the customer.

In this connection an officer of Machine Tool Electronics wrote a letter in which he indicated --

MR. HUGHES: Well now, just a minute, your Honor, as to the contents of the letter. I have no objection to some reasonable recital, but when he starts to tell us --

THE COURT: Don't tell us what is in the letter. There was a dispute. Is that right?

MR. BOBBE: Yes.

THE WITNESS: Yes.

THE COURT: Did you ultimately take them back?

THE WITNESS: No, my ultimate action on that was to inform the customer that we could not accept the units for refund, but we would exert every effort to help them find a way to use them.

BY MR. BOBBE:

Q Apart from that, did you have any other difficulty with any other customers?

A No.

Q Now, who were the persons in the employ of Twin Discs during the year of 1972, from the beginning of that year until October 9, 1972?

A Of Twin Discs, Mr. Bobbe, or --

Q I'm sorry. At LEM Instrument.

A Well, Mr. Robert Everett -- would you repeat the date for me, please?

Q In the months prior to October of 1972.

A In the months immediately prior it was Mr. Everett, Mr. Gay and Mr. Scaar, and myself.

Q Up to the month of --

MR. HUGHES: Excuse me. I didn't get the question. Those were the months immediately preceding October?

MR. BOBBE: January through October, 1972.

MR. HUGHES: Thank you.

THE COURT: Who were the officers you say? Was that the question?

MR. BOBBE: Employees.

THE COURT: Oh, the employees of LEM. Very well.

MR. BOBBE: Outside of Mr. Lowell himself.

BY MR. BOBBE:

Q Now, up to August 11, 1972, had you had any disputes or controversy with any of those three gentlemen?

A None that I can recall. No, I didn't have any.

Q Well, confining yourself to Mr. Gay and Mr.

Scaar, did you have any disputes of any kind with them?

A Never.

Q Now, with reference to Mr. Everett, did an incident occur on August 11, 1972, between you and him?

A Yes.

Q Will you tell us what happened on that day?

A I believe August 11th was a Friday?

Q Yes.

A And that was the Friday preceding my planned vacation for two weeks.

Mr. Everett had been out on his vacation for two weeks and had been back at the plant for one week, the week ending the 11th.

On the afternoon of the 11th, I asked Mr. Everett if he had completed an assignment that I had asked him to do the preceding Monday when he first returned from his vacation. I had asked him to mail some catalogs to each of the several officers of one of our new sales representatives, and I had placed the list of names and the addresses of the officers on his desk on Monday and asked him if he would arrange for that.

Well, as I say, on Friday afternoon I asked him if he had done that, and he said, "No," he hadn't done it.

And, I asked him why, and he immediately became very loud and insulting and told me that, well, he didn't have to do anything I told him, and he didn't really mind helping me, but if I didn't like the way he did things or when he did things I could do them myself.

I pointed out to him that that was one of his duties, that I had asked him to do it on Monday, that he had wasted a great deal of time during the week -- in fact, he left early on two or three days, and he knew I was leaving on vacation and how important I felt it was to have these catalogs mailed out.

Well, that released another torrent from him, and he told me that, well, he just wasn't going to take orders from me.

I told him that if he didn't do this I would be hard pressed to ignore it and that I would have to take some action. So, he taunted me and asked me what action. I said, "Well, if you continue to disobey my requests, I'll have to discharge you."

And, he said, that I had no authority to do that, that he was the vice president, he had a contract, and that if I were going to discharge him, I better put it in writing.

So, at that, I sat down at the typewriter and I typed out a letter informing Mr. Everett that his continual failure to --

MR. HUGHES: Now, if your Honor please, I object.

THE WITNESS: I wrote a letter which I presented to him.

THE COURT: Objection sustained.

Q Is this the letter you wrote?

A This is a copy of the letter, yes.

MR. BOBBE: I offer it in evidence.

MR. HUGHES: No objection.

THE COURT: Mark it, please.

*****

(Letter above referred to was marked Plaintiff's Exhibit 9 in evidence as of this date.)

THE COURT: By the way, Everett was what, the vice president?

THE WITNESS: Yes.

THE COURT: Could anybody else have mailed those things?

THE WITNESS We only had four employees, your Honor, and Mr. Everett customarily would

do that for me, or for the company.

THE COURT: There was nobody in the office who could just mail it?

THE WITNESS: No, sir.

THE COURT: All right.

MR. BOBBE: Did you have a secretary?

THE WITNESS: No, we didn't.

MR. HUGHES: Can we read that to the jury?

MR. BOBBE: Do you want to read that to the jury?

THE COURT: Just a minute. All right. It has been marked 9 in evidence.

(Whereupon, Mr. Bobbe read Plaintiff's Exhibit 9 in evidence to the jury.)

BY MR. BOBBE:

Q Now, did you receive a call from Mr. Gibson after you wrote this letter to Mr. Everett?

A Yes, I did.

Q When did you receive that call, and where were you?

A It was at my home, the following Tuesday.

Q Was this a long distance telephone call you

received?

A I believe it was, yes.

Q What was the conversation that you had with Mr. Gibson?

A Well, Mr. Gibson told me that he had heard from Bob Everett the preceding Friday and that Bob Everett had told him that we, that is, Bob and I had had an agrument, and that I had fired Bob.

Mr. Gibson told me that he had told Bob to return to work as usual the following Monday and that he, Mr. Gibson, would be coming out east to see what was the problem and see if it couldn't be patched up. Then he told me that he was indeed planning to come east within the next few days and that he would let me know as soon as his travel plans were completed so that I could expect him.

He asked me what I was doing. I told him that I had left the office on Friday afternoon after my argument with Mr. Everett, that I had spent most of the afternoon instructing Mr. Gay and Mr. Scaar, the other two employees of LEM, on what they should do, and that when I went home, instead of leaving for my vacation I cancelled my vacation plans and decided to stay at home.

I had been home the whole weekend and also

Monday and Tuesday, and that I would be happy to meet with him and Bob and see what the difficulties were and how we might resolve them.

He also informed me that between Friday and Tuesday he had had conversations with Mr. Howell and Mr. Beaton, and I believe he said a Mr. Batten as well, about the situation at LEM, and that he felt the best thing to do was for him to come east and meet with Bob and me. I told him, "Well, I'll be at home thinking about what the next best move should be, and I'll certainly be prepared to meet with you when you come."

Q Now, did he come within the next few days?

A No, he did not.

Q Did he call you again and make another appointment?

A Not at home, no.

Q When was the next time you heard from him?

A The next time I heard from him was approximately two weeks later when I was back at the office. He telephoned me to tell me that he was sorry that he had not been able to arrange travel, but that he was still planning to come east to meet with me and Bob, and that he would get back to me as soon as he knew when.

Q Did he keep that appointment?

A Well, he didn't really, no. I think there were at least two other times when he thought he might come and he didn't come, before he in fact did come.

Q And when did he finally come?

A He finally came on the, I believe it was the 27th or 29th of September.

Q The 27th?

A It could have been the 27th, yes.

THE COURT: What year?

THE WITNESS: Of 1972.

Q Now when he came, did he discuss with you the -- I withdraw that.

Did Mr. Everett remain in the employ of LEM during that period of time?

A Oh, yes. Mr. Everett was in the employ of LEM continuously from the time he returned to work that Monday following August 11th.

Q And were you working with him on the work of the company?

A Yes, we were.

Q And what took place between you and Mr. Gibson when he came to your place on September 27th?

A Well, when he came he asked me first of all some general questions about the state of affairs of the business, as he customarily did when he visited us. I reported to him in some detail on our sales, our sales prospects and various other things that we were doing.

He then asked me how Bob and I were getting along. I told him that, well, of course, we weren't as friendly as we had been for years, but the work was going on and that Bob was still being less than 100 per cent cooperative, but he had improved, I thought, since we had those words.

He then asked me how I felt about the situation, and I said, "Well, I'm most anxious as always to get LEM to the point where it's a highly profitable business, and I intend to continue to exert my efforts with or without Bob's cooperation, and if Bob does not cooperate, then I would have to find a way to correct any such deficiency."

Q And what did he do? Did he speak to Mr. Everett?

A Yes. Then Mr. Gibson asked me if he could speak with Bob and see what Bob's feelings were in this matter. So, I went out in the shop and asked Bob to come into my office, and I left him and Mr. Gibson alone in my office. And so, a very few minutes later, perhaps two

minutes or three minutes later, Bob Everett came out of my office and -- well, I went back in and Mr. Gibson informed me that Bob Everett had told him that under no circumstances could Bob Everett work with me on a continuing basis.

Q Did Mr. Gibson prepare or submit anything to you in writing on that date?

A Yes. Well, after that then Mr. Gibson asked me if I would call Bob back into the office, and I did, and the three of us sat there, and Mr. Gibson then informed us that on the way to our plant, or in the motel -- I forget which he said -- he had been thinking about the situation and what might be done in the event that we could not continue to operate harmoniously. I told him, "Well, I had expressed my feelings on that," and then Mr. Gibson said that he was by no means talking for Twin Discs in any official way, but he had been thinking about ways that Twin Discs might terminate the business of LEM and settle up with Bob Everett and me if that became desirable, and he emphasized two or three times that this was not by any means an official offer or proposal, but he was thinking ahead. And, he said he knew how Mr. Batten felt about these things, and he felt that an offer along the lines which he then proceeded to explain would satisfy Twin Discs.

And he then sat down and in longhand he wrote out a series of steps that would be proposed by Twin Discs as a means of settlement, if it became desirable from their point of view.

THE COURT: To liquidate LEM?

THE WITNESS: To liquidate LEM, yes.

He asked me and Bob Everett what I thought about this. I told him I was quite shocked, that such thoughts had never entered my mind, and I felt I had a contractual obligation until at least 1975 and beyond, and that I couldn't give him any answer at the moment at least.

He asked Bob Everett what he thought and in my presence Everett told him he would let him know in a few days what he thought about it.

Q Now, is this a blueprint of the proposal that Mr. Gibson wrote in his own handwriting on that day? (Handing to witness)

A Yes, it is. He asked Bob Everett to prepare two blueprint copies, one for Everett and one for me, and this is one of those prints.

MR. BOBBE: I offer that in evidence.

MR. HUGHES: No objection.

*****

(Document above referred to was marked Plaintiff's Exhibit 10 in evidence as of this date.)

THE COURT: That's a letter from Gibson to you?

MR. BOBBE: Not a letter, but a memorandum.

THE COURT: A memorandum.

MR. BOBBE: I have a typewritten copy of that, your Honor.

THE COURT: It is a little difficult to read.

MR. BOBBE: Are you sitting much later, your Honor?

THE COURT: No, I think we ought to recess now. You have to go back to Manhattan, both of you.

I think we will suspend, members of the jury, until nine-thirty tomorrow morning. Please be here on time.

I have set down a case, a non-jury case

October 10, 1973
Riverhead, New York

(The trial continued.)

(Roll call of jury.)

F R A N K L O W E L L, the Plaintiff herein, having been previously duly sworn, resumed the stand and testified further as follows:

THE CLERK: Mr. Lowell, I would like to remind you that you are still under oath, sir. You may be seated.

MR. BOBBE: If your Honor please, as we concluded there was introduced in evidence Plaintiff's Exhibit 10, and I would like the opportunity to read it to the jury now.

THE COURT: All right.

(Whereupon, a portion of Plaintiff's Exhibit 10 in evidence was read to the jury.)

MR. HUGHES: Your Honor, may I read the balance?

THE COURT: Yes.

MR. BOBBE: Well, I'll read it, Mr. Hughes.

MR. HUGHES: Thank you.

(Whereupon, Mr. Bobbe read further from Plaintiff's Exhibit 10 in evidence.)

THE COURT: In order to make this clear, was this a proposal that was made to this witness?

MR. BOBBE: I'm going to ask the witness, your Honor.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. BOBBE: (Continued)

Q When this was handed to you by Mr. Gibson, was there any conversation between you and him?

A Yes, there was.

Q What was said by him?

A Well, he said that this was not to be considered a proposal, this was simply a writing down by him of his ideas, of his thoughts on how it might be possible for Twin Disc to get out of the situation they found themselves in with LEM Instrument, if it were desired to do so, and he emphasized repeatedly that he had no authority and no instructions to do this, but that he thought he knew how John Batten was thinking, having worked with John for over thirty years, and he felt that this kind of proposal might be forthcoming if it

were desired by Twin Disc, to dispose of LEM Instrument Corporation.

Q Did he mention that any statement had been made to any of the other directors?

A Oh, yes. He reported to me that he had talked with Mr. Beaton and Mr. Howell and that -- well, for instance, Mr. Beaton had suggested to him the only -- as near as I can quote him, Mr. Beaton said, "Why don't we just fire both the bastards and get it over with." And, Mr. Gibson said, "Of course, "That's ridiculous. That was no answer, and Beaton was as much help as a hole in the head" or words to that effect.

Q Did you make any comment about the proposal, or I should say with regard to the statement contained in the letter?

A Well, I told him that I certainly was very much surprised that he should even be thinking such things or that anyone at Twin Disc should be thinking along those lines, that I had a great deal of enthusiasm for building LEM into a successful business and that I had a great financial stake in the success of LEM and that I was so completely surprised I couldn't even comment on such an idea.

So he asked me then to think about it, if I

would, and I agreed under the circumstances, of course, that I would think about it. But, I made no other comments about it.

Q Did you hear from anyone connected with Twin Disc or any of the outside -- the Twin Disc Directors subsequent to September 27, until October 9th, between those two dates?

A I don't believe so, no.

THE COURT: What year?

THE WITNESS: 1972.

Q Well, did you have any conversation with Mr. Howell between those two dates, on the telephone?

A Oh, yes. I had one telephone conversation with Mr. Howell on October 4, 1972. On that date I called Mr. Howell for two reasons. One to inform him that LEM Instrument --

MR. HUGHES: Now, your Honor can't we have the substance of the conversation?

THE COURT: Yes. Never mind your reasons. Tell me and the jury what you said to him and what he said to you.

THE WITNESS: Yes, sir. I told Mr. Howell that --

THE COURT: Mr. Howell now is with Twin Disc?

THE WITNESS: He is the vice president and secretary of Twin Disc.

THE COURT: All right.

THE WITNESS: I told Mr. Howell that LEM Instrument Corporation would be short of working capital within the next week or so and that we would require a loan or an advance from Twin Disc. And, after discussing with me what our accounts receivable were at that point in time, he said, well, he would see to it that a check for $12,500 was forwarded to us at once.

I then reminded Mr. Howell that we were scheduled to have a Board of Directors' meeting, a LEM Board of Directors' meeting within the next couple of days and that I had not received any word from anyone at Twin Disc confirming the date and the place of the meeting. In general, the date and place were determined by Mr. Batten's schedule.

Howell told me that, yes, he was aware

of the fact that a meeting was scheduled for, within the next two or three days, and that he would check with Mr. Batton and get back to me and let me know when the meeting will in fact be held.

THE COURT: Well now, you mentioned the amount of the check that he said he would send you.

THE WITNESS: Yes.

THE COURT: What was that amount again?

THE WITNESS: $12,500.

THE COURT: Thank you.

BY MR. BOBBE:

Q Did you ever receive that check?

A No, I never did.

Q When was the next time after October 4th that you heard from anybody?

A I believe it was October 9, 1972.

Q Whom did you hear from?

A Well, on the morning of October 9, 1972, when I came to the office Mr. Gibson and a Mr. Simpson of Twin Disc, whom I had never met before, were waiting in my office

with Mr. Everett.

Q Did you find out what relation Mr. Simpson had with the Twin Disc Corporation?

A He was introduced to me as the manager of corporate personnel, or some such title.

Q Tell us what happened on that day after you came to the office and you found Mr. -- these two gentlemen present. Was Mr. Everett present?

A Yes, the three of them were in my office, or the adjoining office, which was Mr. Everett's office, when I arrived at work.

Q Was the business of LEM being carried on in the usual course during that time, up to that time?

A Oh, yes. Quite definitely.

Q Was Mr. Everett continuing to work with you in the conduct of the business up to that time?

A He was continuing to work with me, yes.

Q Tell us what was said and what was done after you arrived at the place of business on October 9, 1972.

A Well, after some social conversation Mr. Gibson informed Mr. Everett and me that there had been a meeting, or there had been two meetings, one of the shareholders of LEM and another of a portion of the Board of

Directors of LEM Instrument, and that these meetings had been held either in Racine or in some place in Connecticut, I'm not sure -- he wasn't clear -- and that it had been decided that Bob Everett and I and all the other employees of LEM were to be discharged, that Everett and I were to be discharged for cause, and that we were immediately to stop all operations of LEM, that he was going to the bank and instructing the bank that neither Bob Everett nor I could any longer sign checks drawn on the account of LEM, that all customers and vendors and suppliers of the company were to be notified that the business was to cease, that I was not to take any further orders, and furthermore, that I should gather all my belongings up and get out immediately.

Q And what did you say to that?

A Well, after expressing my shock, I asked Mr. Gibson to tell me what reasons there were for discharging me. He said, well, he couldn't give me any reasons because that was for my lawyer to find out.

I then protested and told Mr. Gibson that I didn't believe he as Chairman of the Board had the authority to discharge me, that I had a contract which guaranteed my employment, that this contract was further guaranteed by Twin Disc and that if in fact Twin Disc intended to go through with

what he had outlined to me that LEM and Twin Disc would face serious consequences.

He told me that those were his instructions, or orders, that he had been told to come out and hit me on the head so that I would be more ~~immunable~~ amenable to a simple settlement and that if I wanted to, then his informal suggestion made to me and Bob Everett on September 27 could be made into a formal offer which would sell the -- or transfer the assets of LEM Instrument to Bob Everett and/or me, and failing that Twin Disc was willing to give each of us, Bob and me, a year's salary if we would release LEM and Twin Disc from their obligations under the various contracts that we had.

Q Now, was this proposal reduced to writing?

A Yes. After listening to Mr. Gibson and protesting several times, he said, "Well, let me put it in writing, and you may want to consider it."

So, he sat down and either wrote it out or copied it from some notes that he had. In fact, he asked me to type it for him, and I did so. And, he gave Mr. Everett and me each a copy of two different letters.

Q Is this one of the letters that you typed out and which was signed by Mr. Gibson and delivered to you

on that occasion?

A Yes, it is.

MR. BOBBE: I offer it in evidence.

MR. HUGHES: No objection.

THE COURT: Mark it in.

*****

(Letter above referred to was marked Plaintiff's Exhibit 11 in evidence as of this date.)

MR. BOBBE: May I read it to the jury, your Honor?

THE COURT: Yes.

(Whereupon, Mr. Bobbe read Plaintiff's Exhibit 11 to the jury.)

BY MR. BOBBE:

Q Now, Mr. Lowell, did you receive any notice of the Directors' meeting, the Board of Directors of LEM Instrument Corporation?

MR. HUGHES: I object to that as incompetent, irrelevant and immaterial.

THE COURT: Well, it may have a bearing. I'll allow it. Overruled.

A No, I did not receive any such notice.

Q And you say a copy of this was also handed to

Mr. Everett, is that correct?

A Yes.

Q Did he make any comment about it in your hearing to Mr. Gibson?

A Yes, he too asked Mr. Gibson to tell him what the cause was, and Mr. Gibson refused to tell him. And, he also questioned the correctness of this action. He said, "I don't think this is right," or words to that effect.

Q And what did Mr. Gibson say?

A Mr. Gibson said, he assured us that he had the authority to act the way he was acting.

Q Did he tell Mr. Everett the cause for his discharge?

A No, not in my presence.

Q Now, were any of the other employees of the corporation discharged on that date?

A Not on that date, no.

Q And were they discharged subsequently?

A Yes, they were.

Q When?

A Two days later.

Q On the same date, October 9, 1972, you said a second letter was also prepared -- was typed by you at the

request of Mr. Gibson?

A Yes.

Q I ask you if this is the letter that you are referring to.

A Yes, it is.

MR. BOBBE: I offer that in evidence.

MR. HUGHES: No objection.

THE COURT: Mark it.

*****

(Letter above referred to was marked Plaintiff's Exhibit 12 in evidence as of this date.)

MR. BOBBE: May I read that to the jury,your Honor?

THE COURT: Yes.

(Whereupon, Mr. Bobbe read Plaintiff's Exhibit 12 to the jury.)

THE COURT: Now, you never accepted this proposal?

THE WITNESS: No. I told Mr. Gibson --

THE COURT: No. You didn't accept it?

THE WITNESS: I did not.

THE COURT: All right.

BY MR. BOBBE:

Q Did you have any further conversation with Mr. Gibson on that day with reference to these two proposals?

A Yes, I did.

Q What was said?

A Well, I told Mr. Gibson that I thought that this method of settling with Bob Everett and me was not in accordance with the terms of our employment and other agreements, that I thought it was very unfair, and that I questioned his authority to tell me I was discharged and to make such offers to me.

Q On that date, was anything said about the cost of salary adjustment?

A Yes. I took the opportunity during part of the conversation to remind him that we, he and I had many times discussed the accrued salaries resulting from adjustments that were to be made to Mr. Everett's salary and my salary for changes in the cost of living, and that certainly I recognized that we were reaching a point where something had to be settled between Twin Disc and LEM on one hand and Everett and me on the other, and that any settlement must also provide for a settlement of the moneys owing us as a result of these cost of living adjustments.

Q Now, had there been any prior discussions -- pardon me.

Did Mr. Gibson reply to that?

A Yes. He said, as nearly as I can recall, "Well, we are all well aware of the fact that these cost-of-living adjustments were deferred, and we would have to, of course, work that out. I'm sure we could work something out."

Q Did you have any prior conversations with Mr. Gibson about the cost-of-living adjustments?

A Oh, yes. I had several such conversations. The first one took place some few months after July of 1968. I believe it would have been sometime in September of 1968 because that was the time when the first cost-of-living adjustment was to have been made, and I had a discussion with Mr. Gibson pointing out to him that our contracts provided for these adjustments, and that we were certainly entitled to them.

He said to me at that time, well, he knows that we are entitled to these cost-of-living adjustments, that he and the other management employees -- in fact, all the employees of Twin Disc were getting such adjustments, but he thought it would make a very favorable impression on Mr.

Batten if we deferred the payment of these increases to ourselves until LEM was on a more solid footing and was showing a profit.

I told him, well, I would discuss that with Bob Everett. I felt that we would go along with that as long as it was clearly understood by everybody that such deferral didn't represent a waiver or giving up of the increase, that all I would be willing to do would be to let these increases accrue so that they could be paid to us at a time when the financial drain on the corporation would be less meaningful.

Q And did he respond to that?

A Yes. He said he thought that was -- that would be exactly the right thing, that again it would impress the people at Twin Disc favorably, that it would show them that we were not just trying to grab money out of the company but would wait until it was appropriate.

I had several such conversations with him over the next two or three years.

Q Prior to October 9, 1972, when you got this letter discharging you, and Mr. Everett did, had there been any statement to you by any member of the Board of Directors, including Mr. Gibson, showing any dissatisfaction of any kind with your work?

A None whatsoever. On the contrary, they were always very complimentary. Mr. Gibson at one time I recall told me that he thought -- Mr. Batten had told him that I was some kind of a genius being able to handle --

MR. HUGHES: Well, just a minute.

THE COURT: Is this what Gibson said to you?

THE WITNESS: This is what Gibson said to me, yes, reporting what --

MR. HUGHES: I withdraw the objection.

THE COURT: All right.

BY MR. BOBBE:

Q What was it?

A Mr. Gibson said to me that Mr. Batten had told Mr. Gibson that he thought I was a genius, or words to that effect. I think he said that, and that all the --

MR. HUGHES: Well now, wait a minute then. I move to strike it out. One minute he says positively, and now he says "I think he said it," your Honor.

THE COURT: Tell us as clearly as you can recall in substance if you can't recall the exact words, what Mr. Gibson said to you.

THE WITNESS: Well, on this particular occasion he clearly said to me that Mr. Batten had told him that Mr. Batten thought I was a genius.

Now, there were other occasions, many such occasions when the Directors of LEM Instrument Corporation were very complimentary. They repeatedly told me that they relied entirely upon my judgment in the running of the affairs of LEM Instrument, that they were fully confident that what I was doing was correct, and that they couldn't suggest any better ways of doing things. We all recognized that the company was a growing company.

BY MR. BOBBE:

Q Did you have any later conversation after October 9th with Mr. Gibson on this subject of your discharge?

A Well, yes. Mr. Gibson and Mr. Simpson --

MR. HUGHES: Well now, I object to any conversations after this date, your Honor.

THE COURT: I'll allow it, but keep away from any attempt at compromise of this claim.

Q Did Mr. Gibson ask you to think this over?

A Yes.

MR. HUGHES: I object, your Honor.

THE COURT: After October 9th?

MR. BOBBE: No, on October 9th.

THE COURT: I'll allow it.

A Well, on October 9th he told me to think over the contents of these two papers that he gave me, and that for the time being Everett and I and the other employees were to continue as if nothing had happened, and that he was going to consult with other people at Twin Disc, and that even though he had served us with this notice of discharge that we should act as if we had not been discharged.

So, I continued to do so. Then he said that he and Mr. Simpson would return to LEM Instrument Corporation the following morning to meet with Everett and me to further discuss this matter.

Q Did you meet the following morning?

A Yes, I did.

Q And what occurred on that date?

MR. HUGHES: Well, your Honor, I object if he is getting into an area which would seem to me that is clearly inadmissible.

THE COURT: No, I think this is in close proximity to the date of the letter, and I'll allow it.

A Well, I arrived at the office before --

THE COURT: Never mind that. What happened at the meeting?

Q On October 10th.

A The meeting with Mr. Simpson and Mr. Gibson?

Q Yes.

A At that meeting, I gave Mr. Gibson a copy of a set of ideas and thoughts that I had prepared that morning before his arrival. These were suggestions which I thought could lead to a favorable settlement between Twin Disc and Bob Everett and myself.

Q I show you --

MR. HUGHES: Your Honor --

THE COURT: Now we are getting into an area I don't think is pertinent and material, anything dealing with a possible adjustment after the date of the proposal which this witness says he turned down. I say it is not, therefore, material.

MR. BOBBE: Well, your Honor --

THE COURT: I permitted in evidence those negotiations that took place prior to October 9th.

MR. BOBBE: Well, there were none prior to October 9th.

THE COURT: Well, there were, weren't there, on October 9th?

MR. BOBBE: Yes.

THE COURT: The objection is sustained.

MR. BOBBE: May I, for the purpose of the record, offer in evidence -- well, I'll ask the witness if he prepared it.

BY MR. BOBBE:

Q Is this the paper that you prepared and submitted to Mr. Gibson?

A Yes, I prepared it at his request.

THE COURT: Well, there was no action to that either, was there?

THE WITNESS: Yes, there was, your Honor.

THE COURT: There was?

THE WITNESS: Yes, sir. Considerable action for the next couple of days.

THE COURT: You mean there was an acceptance?

THE WITNESS: There were negotiations.

THE COURT: Was there an acceptance of this?

THE WITNESS: By Twin Disc?

THE COURT: Yes, by Mr. Gibson.

THE WITNESS: There was no final acceptance.

THE COURT: All right. Sustained.

MR. BOBBE: Have I offered it in evidence yet?

THE COURT: Yes, an offer of proof.

MR. BOBBE: May it be marked for identification, your Honor?

THE COURT: Yes. Mark it for identification.

*****

(Document above referred to was marked Plaintiff's Exhibit 13 for identification only as of this date.)

THE COURT: That is dated what?

MR. BOBBE: It's not dated, your Honor.

THE COURT: All right.

BY MR. BOBBE:

Q That paper marked for identification was delivered to Mr. Gibson on October 10th I think you said?

A Yes.

Q Did Mr. Gibson tell you that this proposal contained in this letter was being submitted to Twin Disc?

MR. HUGHES: I object, your Honor.

THE COURT: Sustained.

Q Did you see Mr. Gibson again on October 11?

A Yes, I did.

Q What happened, if anything, on that date?

MR. HUGHES: Well, I again object to that, your Honor, as getting into this same area that I presume it is.

THE COURT: Well, I think we are getting into an area that is not material to the issues. Any subsequent attempt to settle this -- there is no question here that there was no settlement of this situation at all.

MR. BOBBE: That's right.

THE COURT: So that I'll sustain the objection.

Q Did you remove any of your personal belongings on October 11, 1972?

A Yes, I did.

Q Did Mr. Gibson write out this letter and hand it to you on that day?

A Yes, he did.

MR. BOBBE: I offer that in evidence.

MR. HUGHES: No objection.

THE COURT: Mark it in, please.

***** (Letter above referred to was marked Plaintiff's Exhibit 14 in evidence as of this date.)

MR. BOBBE: May I read it to the jury, your Honor?

THE COURT: Yes.

(Whereupon, Mr. Bobbe read Plaintiff's Exhibit 14 to the jury.)

BY MR. BOBBE:

Q Now, had you made any personal calls on any customers during the months of August and September, 1972?

A Yes.

Q On which customers was that that you made this personal call?

A I called on a company called Program Remote Systems, St. Paul, Minnesota.

Q Are they familiarly known as PAR?

A PAR Systems, yes.

Q Had they bought any of your encoders?

A Oh, yes, on several occasions.

Q And they had reordered?

A Yes.

Q Did you at that time, the time of your call on PAR Systems, obtain any new orders?

A Well, I obtained information that such an order was to be forthcoming shortly.

Q And did you hear from them subsequent thereto?

A Yes, I did.

Q When?

A I received a telephone call at home in December sometime of 1972.

Q From PAR Systems?

A Yes, from both the vice president of engineering and the purchasing agent of PAR Systems.

Q And what was that conversation about?

MR. HUGHES: I object to that, your Honor.

THE COURT: Well, the conversation won't be binding, but it has a bearing on what attempts he made toperform his contract. For that reason I'll allow it.

A Well, Mr. Rose, I believe -- yes, Mr. Rose, the vice president of PAR Systems and the purchasing agent informed me that they had attempted on four different occasions to reach me at LEM Instrument Corporation in order to place an order with LEM for more encoders, and that each time they were told that the message would be given to me. And, of course, I never received those messages, and I wasn't aware of them. So finally, they became concerned because they depended entirely upon LEM as a supplier for these encoders, and so they found my telephone number in the telephone directory and decided to try me at home.

They asked me what was going on at LEM and how come I don't answer my telephone calls. Well, I informed them that I was no longer employed by LEM and that I didn't know what was going on at LEM except that operations had been suspended. And, they asked me if I knew any way to help them fill this order that they must place with LEM.

I told them that, well, I knew that there were no longer any employees at LEM, that I thought perhaps within

a month or so I might have settled my problems with Twin Disc, and that if they could hold off that long that I would be most happy to immediately get to work on filling the order for them.

Now, they said that they didn't think they could hold off that long, but would I please --

THE COURT: Well, I don't think we have to go into all this.

Q All right, fine. Now, what was the average price of your encoders?

A The encoders average price was between $600 and $700 each.

Q Each. And were orders received in large quantities, or in what quantities were they received usually?

A One to twenty units at a time.

Q Was the merchandise, the encoders -- were they manufactured as the orders were received?

A Generally, yes, because the orders called for some variations of our catalog items in most instances.

Q I show you a letter dated July 24, 1972, and ask you if -- on the letterhead of Twin Disc, Inc., and ask you if you received that letter from Mr. Gibson.

A Yes, I received this letter.

MR. BOBBE: I offer it in evidence.

MR. HUGHES: No objection.

THE COURT: Mark it in, please.

*****

(Letter referred to was marked Plaintiff's Exhibit 15 in evidence as of this date.)

MR. BOBBE: I would like to read a portion of that, your Honor.

THE COURT: All right.

(Whereupon, Mr. Bobbe read from Plaintiff's Exhibit 15 in evidence to the jury.)

BY MR. BOBBE:

Q Was it subsequent to the receipt of that letter that you made the call to PAR Systems?

A Yes, it was.

Q And did you call other customers or prospective customers subsequent to that letter?

A Yes, I believe I called on one other customer in that period in the New York area.

Q Did you make a monthly report to the Board of Directors subsequent to the receipt of that letter of July 24, 1972?

A Yes, I did.

Q I ask you if this is a copy of the report

that you submitted to the Board of Directors in the month of September, 1972.

THE COURT: Board of Directors of which corporation?

MR. BOBBE: Of LEM Instrument Corporation.

A Yes, I believe it is. I believe there was another report though before that as well.

Q Pardon me? Is this a report that you submitted on the 11th of August, 1972? (Handing second document to witness)

A Yes, it is.

MR. BOBBE: I offer both reports. I think they are separate exhibits, one dated August 11, 1972 --

THE COURT: Show it to your adversary.

MR. HUGHES: Your Honor, may I ask one or two questions?

THE COURT: Yes, on the voir dire.

VOIR DIRE EXAMINATION

BY MR. HUGHES:

Q Mr. Lowell, do I understand you to say that you began making reports to the Board of Directors with this

report of August 11, 1972?

MR. BOBBE: No, that isn't what his testimony was.

A No, I never said that. I reported every month for four years or more to the Board of Directors of LEM Instrument Corporation, in writing.

Q In writing?

A Yes.

MR. HUGHES: No objection to this first exhibit, your Honor.

THE COURT: That's dated October 11th?

MR. BOBBE: No, August.

THE COURT: August 11th. All right.

***** (Report to LEM Instrument Corp. dated August 11, 1972 was marked Plaintiff's Exhibit 16 in evidence as of this date.)

THE COURT: Is there another one?

MR. BOBBE: Yes.

MR. HUGHES: No objection to the latter one, your Honor.

THE COURT: All right.

***** (Report dated September 15, 1972 was marked Plaintiff's Exhibit 17 in evidence as

of this date.)

(Whereupon, Mr. Bobbe read Plaintiff's Exhibit 16 to the jury.)

BY MR. BOBBE:

Q Who is Lybrand that is referred to in this letter?

A Lybrand refers to Lybrand, Ross Bros. & Montgomery who were Twin Disc's outside auditors and who also, on a yearly basis, on Twin Disc's behalf, audited LEM's books.

Q Now you referred to having signed a sales representative with Reynolds & Associates in the past month. Had you also any further contract with any sales representatives obtained during the year of 1972?

A Yes, there was one other new representative that we signed an agreement with during thatsame period. I'm not sure if it was just before or just after Reynolds.

Q And do you remember the name?

A Yes, that was Lawson Associates.

MR. BOBBE: Now, I would like to read the report to the Board of Directors dated the 15th of September, 1972.

MR. HUGHES: Mr. Bobbe, before you

do that, may I say that there was another page, wasn't there, to that first document?

MR. BOBBE: Oh, yes.

MR. HUGHES: A financial statement?

MR. BOBBE: Yes. Have you got it attached there?

MR. HUGHES: Well, may I draw your attention to that, your Honor?

THE COURT: Yes.

MR. HUGHES: The last page of this document that Mr. Bobbe has been reading from is a statement of assets, and a profit and loss statement. I'm not going to go through all of these figures, but I would like to read it to the jury, your Honor.

It says, "Statement of loss, month end July 31, 1972: Sales, $2,830.

"Net loss, $5,187.89."

MR. BOBBE: All right. Now, I would like to read from the report of September 15, 1972, to the Board of Directors who are mentioned by name.

(Whereupon, Mr. Bobbe read Plaintiff's

Exhibit 17 in evidence to the jury.)

MR. HUGHES: Mr. Bobbe, do you have the financial statement of August 31?

MR. BOBBE: No, I don't have a copy of that. The letter refers to the fact that the financial statement is not ready.

MR. HUGHES: Yes, and I'm asking you whether you have that statement.

MR. BOBBE: No, I don't.

BY MR. BOBBE:

Q Did you receive any response or comments whatsoever from anyone connected with Twin Disc after the rendering of these reports which have just been introduced in evidence, regarding the contents of the reports?

A No.

Q I show you a letter from Twin Disc dated May 31, 1968, this inter-office communication from Twin Disc dated May 28, 1968, and another inter-office communication dated August 29, 1968, another one of November 27, 1968, and another one dated February 25, 1969, all relating to the cost of living provisions, and ask you if you received these in due course at the time around the dates appearing on these.

A Yes, I received these.

MR. BOBBE: I offer them in evidence as one exhibit.

MR. HUGHES: No objection.

THE COURT: Mark them in.

*****

(Documents above referred to were marked Plaintiff's Exhibit 18 in evidence as of this date.)

MR. HUGHES: Your Honor, Mr. Bobbe suggested that he summarize these to the jury, and that is satisfactory to me subject to any additional comment that might seem appropriate.

THE COURT: Very well, go ahead.

MR. BOBBE: These documents all refer to the basis for computing the cost of living and wages and salary adjustments for the employees of Twin Disc Inc. which were to apply according to the contract to Mr. Lowell and his contract, and they are dated from May 31, 1968 to November 27, 1968.

BY MR. BOBBE:

Q Did you subsequently, during the course of this litigation, receive a copy of an ~~admitted~~ proposed cost of living formula for salaried employees of Twin Disc, dated January

16, 1973?

A I believe you received it and showed it to me, Mr. Bobbe, yes.

Q Is this it?

A Yes.

MR. BOBBE: I offer that in evidence.

THE COURT: You received it from whom?

MR. BOBBE: Well, it was received by me, your Honor, from the Defendant's attorneys.

MR. HUGHES: Your Honor, Mr. Bobbe says that this was supplied to him during the course of a deposition in another action, and I don't dispute that, and there will be no objection.

THE COURT: Very well.

*****

(Document above referred to was marked Plaintiff's Exhibit 19 in evidence as of this date.)

MR. HUGHES: Mr. Bobbe, if you are not going to use that Exhibit, may I see it?

MR. BOBBE: Surely.

BY MR. BOBBE:

Q Did you have any discussion with Mr. Gibson at any time regarding the other benefits included in your contract, the so-called fringe benefits?

A Yes, I had several conversations with him on that same subject.

Q And do you recall when you had such a conversation approximately?

A Well, the first conversation on that subject would have been the same time that we discussed the deferral of the cost of living increases. In connection with that, Mr. Gibson suggested --

THE COURT: No. About what time was it? What date?

THE WITNESS: I would say it was sometime during the month of September perhaps, 1972.

Q 1972?

A Excuse me, 1968. September, 1968.

Q What was the conversation about the fringe benefits?

A Well, I reminded Mr. Gibson that the employment contract that I had provided for a number of fringe

benefits, and that Bob Everett and I had talked about these things, and that we were desirous of instituting the various policies and insurance programs that these fringe benefits described, and he told me that, well, he thought as with the cost of living increases that it would be desirable to go slow on those things, but he recognized that we were certainly entitled to them.

I had other conversations on the same subject, particularly on the matter of insurance and retirement plans, for about a year after that first conversation. In fact, the Twin Disc insurance agent contacted me and Bob Everett at LEM several times, being anxious to make the sales with us, and when I spoke with Mr. Gibson about the persistence of this man and how I was still uncertain as to what we should do about it, he again suggested that we defer the instituting of these various programs until the profits of LEM reached a significant level. He said he would then write a letter to this insurance agent telling him to be patient, or words to that effect, and he asked me to write a letter thanking this man for his attentions and both such letters were written.

Q Did you receive a copy of the letter that Mr. Gibson wrote to Mr. McGuire? Did you receive a copy from

Mr. Gibson?

A Yes, I did.

Q I ask you if this is the letter that you received.

A Yes, it is.

MR. BOBBE: I offer it in evidence.

MR. HUGHES: No objection.

THE COURT: Mark it in. What is the date of it?

THE CLERK: June 25, 1969.

(Letter dated June 25, 1969 was marked Plaintiff's Exhibit 20 in evidence as of this date.)

*****

(Mr. Bobbe thereupon read Plaintiff's Exhibit 20 to the jury.)

MR. BOBBE: I now offer in evidence, in accordance with a stipulation between counsel, as to some of the fringe benefits -- and I have shown this to my adversary, and he has no objection --

THE COURT: All right. Mark it.

MR. HUGHES: Your Honor, that's an original document. There seems to be some

penciled notations on it which I think you will agree constitutes no part of the exhibit.

MR. BOBBE: Of course. The ~~printed~~ penciled notations are mine, and are not a part of what I am offering.

THE COURT: Can they be erased? You may do it after it's marked.

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(Document dated May 17, 1973, addressed to Sidney S. Bobbe, was thereupon marked Plaintiff's Exhibit 21 in evidence as of this date.)

MR. BOBBE: This stipulation refers to fringe benefits which the Court will instruct the jury about at the end of the case, members of the jury.

BY MR. BOBBE:

Q Did you receive -- was there received. I withdraw the question in that form.

I offered in evidence a statement of inquiries to LEM Instrument Corporation from October, 1972 to the present, which was furnished to me by Defendant's counsel.

THE COURT: What is that? A statement of what?

MR. BOBBE: Inquiries received from --

THE COURT: An interrogatory?

MR. BOBBE: No, inquiries received from customers or prospective customers and others since October, 1972.

THE COURT: I see.

MR. HUGHES: Your Honor, I object to this on the grounds that it is incompetent, irrelevant and immaterial and beyond the time of any facts in issue here. So that my objection is perfectly clear, I don't object to this as being a true compilation. It is honest that it is a true compilation, but I object on the ground that it's incompetent, irrelevant and immaterial.

THE COURT: Well, Mr. Hughes, doesn't it have a bearing on what efforts he exerted on behalf of the corporation, in light of the fact that there is a question here as to whether he was lawfully discharged and whether he has performed all the conditions on his part to be performed under the contract?

MR. HUGHES: That is true, your Honor,

but if all this amounts to is a compilation of inquiries to LEM Instrument Corporation after a certain date, there is nothing in it which shows what or how these inquiries were generated.

THE COURT: Well, it was at a time when he was president of the corporation, correct?

MR. HUGHES: No.

MR. BOBBE: No.

THE COURT: After?

MR. HUGHES: After, your Honor. That's my point.

MR. BOBBE: Well, I'll ask a preliminary question.

THE COURT: Wait a minute. These inquiries were made after? Isn't it reasonable to assume that they may have been made as the result of what efforts he exerted on behalf of the corporation?

MR. HUGHES: They begin on October 20, 1972 and continue thereafter down through --

THE COURT: Wait. I'll sustain the

objection at this time.

BY MR. BOBBE:

Q Mr. Lowell, are you aware of whether or not the business continued after your discharge on October 9, 1972?

A I believe the business was discontinued.

THE COURT: Entirely?

THE WITNESS: Well, there were no employees there except on a few occasions.

Q And were you aware of when the other employees were discharged?

A I was told by Mr. Gibson that all the other employees were discharged the same time I was, which in fact was October 11th when I was finally put out of the building.

THE COURT: 1972?

THE WITNESS: 1972.

MR. BOBBE: I again offer this paper in evidence.

MR. HUGHES: Same objection.

THE COURT: Sustained.

MR. BOBBE: May it be marked for identification?

THE COURT: Yes.

(Document above referred to was marked

*****

Plaintiff's Exhibit 22 for identification only as of this date.)

BY MR. BOBBE:

Q I ask you to look at Exhibit 22 for identification, and I ask you if you recall any contact that you had with any of the names that appear on there.

MR. HUGHES: Fixing the time and place, if your Honor please?

THE COURT: Yes.

MR. BOBBE: Well, I'll first ask him if he recalls.

THE COURT: Yes or no, and then fix the time and place.

THE WITNESS: Well, the first one I recognize is Dow Chemical Company, Torrence, California, and it's indicated here that on 11/20/72 --

MR. HUGHES: Just a minute. I object to that.

THE COURT: Sustained. Strike it out. Just the name, please.

THE WITNESS: Dow Chemical Company, Torrence, California.

THE COURT: When did you contact them?

THE WITNESS: At least three or four times in the period from January, 1971 to October, 1972.

I recognize Aluminum Company of America. Aluminum Company of America was a customer of LEM Instrument. We had sold that company some of our equipment.

I don't recall the dates.

MR. HUGHES: I'm sorry, I didn't get that.

MR. BOBBE: He doesn't recall the date.

THE WITNESS: (Continuing) Texas Instruments, Inc. I recall that I quoted Texas Instruments on several different occasions, but again, I do not recall the exact dates.

THE COURT: Well, was the Aluminum Company of America a prior customer of LEM?

THE WITNESS: It was a customer of LEM's during the period from July, 1968 until October, 1972.

THE COURT: Well, was it a potential

customer?

THE WITNESS: No, it was an actual customer, your Honor.

THE COURT: Actual?

THE WITNESS: Yes. We had sold them --

THE COURT: All right. Texas Instrument now. Was that an actual customer or potential customer?

THE WITNESS: Potential.

Reliance Electronic Company. That was a potential customer that I had had prior contact with.

Program and Remote Systems Corporation was an actual customer.

BY MR. BOBBE:

Q Was that the same as PAR Systems?

A That is PAR Systems.

Bendix, Kansas City Division. Bendix was an actual customer of LEM Instrument, and, Bendix is repeated here again.

I'm only reading off the names I recognize. Some of the others may --

MR. HUGHES: Well, your Honor, I object. It's perfectly clear what he was asked to do.

THE COURT: Well, I suppose he meant that he recognized these as having had contact with them as either potential customers or actual customers. Is that right?

THE WITNESS: Yes, as I recollect them, your Honor.

THE COURT: Well, that's what we are asking for.

THE WITNESS: Yes.

THE COURT: Go ahead.

A (Continuing) RCA. RCA was an actual customer of LEMs.

Now, General Electric Co. was an actual customer of LEMs.

Digital Equipment Corporation was a potential customer, but I don't recall the dates of contact.

Burroughs Corporation was a potential customer.

Link Engineering Company was an actual prior customer.

THE COURT: What company?

THE WITNESS: Link. L - i - n - k,

your Honor, Engineering Company.

Avco was a potential customer.

THE COURT: Potential?

THE WITNESS: Yes, that I recall. Bendix, an actual customer.

THE COURT: You mentioned Bendix before, twice.

THE WITNESS: Well, they are repeated here, your Honor.

THE COURT: All right.

THE WITNESS: Bendix is again repeated.

Raytheon. That was a potential customer.

Cincinnati-Gilbert Machine Tool Company. Well, Cincinnati Inc. I recall as an actual customer.

Butler Manufacturing Company. That was an actual customer that we had sold to.

Department of the Navy. That was an actual customer that we had sold to.

Aluminum Company of America, a company we had sold to.

Those are the only ones I recognize at

this time.

MR. BOBBE: I renew my offer in evidence of this document, with the qualification of the witness's testimony.

MR. HUGHES: Well, I object.

THE COURT: Do you have any evidence as to what he says were his personal contacts or of actual customers -- strike that out.

You have in evidence his statement that of that list marked Plaintiff's Exhibit 22 for identification these are the only ones that he can recall as being either actual, prior actual customers, or potential customers. You are limited to that proof. You can't put in evidence all the others.

BY MR. BOBBE:

Q Mr. Lowell, have you computed what the amount of the cost of living adjustment is as of the date of your discharge based upon the formula presented by the documents in evidence as to the computation by Twin Disc as to such cost of living benefits?

A Yes, I have computed it.

Q I show you this schedule and ask you if this

is the computation that you made first as to the cost of living adjustment up to the time of your discharge on October 9, 1972.

THE COURT: He said October 11th was the date he actually left.

Q Well, up to the time you were discharged.

A Yes. I have computed these numbers.

Q How much do you compute was due as of that time of your discharge on the cost of living benefits, up to that time?

A I computed $18,220, plus accumulated interest.

Q Now, have you also computed what the salary would have been as of the time of your discharge, if you had included in the $35,000 basic salary the cost of living adjustment as of that date?

A Yes, I did compute that.

Q And what was the amount that you show as of the date of your discharge, as to the salary basic plus cost of living adjustment?

A $42,500, in round numbers.

THE COURT: Up to the date of October 11, 1972, right?

MR. BOBBE: Yes, up to the date of

October 11, 1972.

Q Up to which date actually is that computed?

A Well, let me be certain. Perhaps I did not understand the question, Mr. Bobbe.

What I have computed is the salary including the cost of living adjustments that would have been paid from 10/6/72 through --

THE COURT: 10/6?

THE WITNESS: That was actually the last day I was paid for, your Honor.

Q Would it be through October 9, 1973?

A Yes, through October 9, 1973, and that amount is $42,500.

Q In other words, that is the salary that would be paid to you for the year since the date of your discharge, up to the present date? Is that what your claim is?

A That is correct.

Q Now, have you also made a computation as to the assumption of the amount of interest that would have been accrued to you on the cost of living increases from the date of your original employment up to the present date at the rate of six per cent per annum?

MR. HUGHES: Your Honor, I object to

this.

THE COURT: Sustained. Up to this point there is no evidence in the case, as I see it, that any interest was promised either implicitly or explicitly on any deferred payment if it's established that these were to be deferred.

MR. BOBBE: All right.

Q Taking those two items together, the accrued cost of living increases from the commencement of your employment until the date of your discharge, $18,220, and adding that to what you claim is the salary due up to the present time, you get the figure of $60,720. Is that correct?

A That is correct.

Q Including any interest?

A No, plus any interest.

Q I say, without including any interest?

A Yes, sir.

THE COURT: Well, he said he included interest on the $18,000.

MR. BOBBE: No, I asked about that, and your Honor excluded it.

THE COURT: Yes, but he had testified $18,220 plus accumulated interest.

THE WITNESS: But I didn't state the amount of the interest. The eighteen was without interest.

THE COURT: All right.

BY MR. BOBBE:

Q Now, have you computed what the salary would be including the cost of living increase, up to the date of your discharge and for the remaining period of your contract?

THE COURT: Namely?

MR. BOBBE: Namely for twenty-seven months.

THE COURT: What is the contract date?

MR. BOBBE: The contract date is July 3, 1968.

THE WITNESS: Plus an additional year at half salary, your Honor.

THE COURT: All right, he's asking you now up to July 3, 1975.

MR. BOBBE: No.

Q Have you included a half year's salary for the additional year after 1975, where you were to be employed as

a consultant?

A Yes, I did, and that's how I arrived at twenty-seven months.

Q And what is the computation --

THE COURT: Well now, why don't we break it down the same as you did before. What is the amount of it, if he has computed it? What is the cost of living adjustment let's say from October of this year to July 3, 1975?

MR. BOBBE: Your Honor, I haven't included the cost of living adjustment from the date of discharge -- rather from the present date on. I am not including the cost of living adjustments.

THE COURT: I see.

BY MR. BOBBE:

Q So what was the annual salary on which you have based your computation for the future?

A I based it on the annual salary that I would have been normaly paid as of October 9, 1973, and that salary I computed as $43,200 per year.

THE COURT: What was that figure?

THE WITNESS: $43,200.

MR. HUGHES: Well, your Honor, unless I'm mistaken, he said $42,500.

THE COURT: $42,500.

THE WITNESS: No, that was for the prior year. That was the accumulated from October 9, 1972 --

THE COURT: Your lawyer now is asking you to tell us without any accumulated interest -- adjustments rather.

THE WITNESS: Well, may I explain?

THE COURT: No, answer the question.

THE WITNESS: I believe I have, your Honor.

THE COURT: Well, I don't think you have.

MR. BOBBE: May I clarify it, your Honor? The previous figure was up to the present date.

THE COURT: October 9th?

MR. BOBBE: 1973. Now, I'm asking as to what the salary would be in the remaining period of the contract.

THE COURT: Salary alone without cost of living?

MR. BOBBE: That's right.

THE COURT: That's whay I want. That's what the question calls for.

MR. BOBBE: From the present date, for the twenty-seven months which includes a half year as a consultant, and that salary, that annual salary would be, according to the computations, how much?

THE WITNESS: $43,200.

BY MR. BOBBE:

Q And what would be the total for the twenty-seven months which you claim remain under the contract?

A $97,200.

Q Now, you have made no provision for any further cost of living increase from the present date up to the end of your term of your contract, is that correct?

A Not in these computations.

Q Do you know whether the cost of living has continued to increase?

MR. HUGHES: Well, I object to that, your Honor.

THE COURT: Sustained.

MR. BOBBE: I ask your Honor to take Judicial Notice of the fact that --

THE COURT: I think everyone knows that the cost of living has gone up, but that's another matter. You are making a claim here, and apparently you haven't figured it out. I don't know whether you are even claiming the cost of living increase for the balance of the term of the contract or not.

MR. BOBBE: May we approach your Honor on this?

THE COURT: Yes, come up.

(Discussion at the bench between Court and counsel, not within the hearing of the reporter.)

BY MR. BOBBE:

Q Now, I compute these three items as the accrued cost of living increase up to the time of your discharge, plus the amount that would have been due --

THE COURT: $157,920.

MR. BOBBE: $157,920, yes.

Q Do you know, Mr. Lowell, what the approximate

cost was of the rental of the automobile that was supplied toyou, until you were discharged?

A Yes. The cost of the rental was approximately $2,500 per year, not including the insurance.

THE COURT: Well, that was to be used in the business, right?

THE WITNESS: Not entirely, your Honor.

THE COURT: Oh? Was that given to you for your personal use?

THE WITNESS: In part, yes.

THE COURT: What part?

THE WITNESS: When I was not using it for business.

THE COURT: Well, what part was that? Would it be fifty-fifty or forty-sixty or what?

THE WITNESS: Well, I worked nearly every day including Saturdays and Sundays, so I find it --

THE COURT: Let me make this observation. If he didn't use the car in the business because he no longer worked there,

how can you claim this item of damage?

MR. BOBBE: Well, it was to be supplied to him indiscriminately whether for use in business or otherwise.

THE COURT: That's why I want to know what part was used in business and what part wasn't. Evidently, it was used for both reasons.

MR. BOBBE: That's right.

THE COURT: And if he is not using it in business, he can't claim now the cost of using it in that business that he no longer was engaged in.

BY MR. BOBBE:

Q Can you estimate the proportion of time that you used it for your pleasure purposes?

A Perhaps fifty-fifty, but that's only an estimate.

THE COURT: Yes, your best judgment is all we want.

Q You mentioned about working Saturdays and Sundays on occasion. How much time did you spend on the average in your occupation as the president and general

manager of LEM while you were there?

A I'd say on the average between fifty-five and sixty hours per week, frequently much more.

MR. BOBBE: Your witness.

THE COURT: I think we'll take a short recess.

Members of the jury, do not discuss the facts of this case, form no opinion in it, and keep an open mind on all the evidence. We'll take a short recess and send for you shortly.

(Whereupon, a recess was declared.)

(After the recess the jury returned to the Courtroom, and the following occurred:)

CROSS EXAMINATION

BY MR. HUGHES:

Q Mr. Lowell, after graduating from City College as you have told us, how many jobs did you hold up to the time when you formed the LEM Corporation in 1965?

A I had four jobs with two companies. I went back and forth twice between two companies, and I had another--perhaps eight jobs altogether.

Q And you were employed by LEM between 1965 and 1972, is that correct?

A That's correct.

Q Now, in December of 1967, did you write a letter to Twin Disc soliciting a possible merger of your company and Twin Disc?

A I wrote a letter, but I don't think it mentioned a merger as a possibility.

Q I show you this Xerox copy of a letter, and I think we have a stipulation that copies are satisfactory, and I ask you if this is the letter you wrote to Twin Disc Corporation.

MR. BOBBE: I don't object to the competence, as to it being a copy, but I object to the materiality.

THE COURT: Objection overruled.

A Yes, this is a copy of the letter.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: I make the same objection.

THE COURT: Objection overruled.

***** (Letter above referred to was thereupon marked Defendant's Exhibit A in evidence as of this date.)

MR. HUGHES: Your Honor, may I read portions of this to the jury?

THE COURT: Yes.

(Whereupon, Mr. Hughes read Defendant's Exhibit A to the jury.)

BY MR. HUGHES:

Q Now, following that letter, discussions took place with representatives of Twin Disc as you have already testified to on your direct examination, is that correct?

A Yes.

Q Now, in the course of those discussions, did you submit a document to any representative of LEM Instrument Corporation with the heading "Business Plan"?

A I don't recall if it was during the course of those negotiations or at the end of those negotiations.

Q I show you a document and ask you if this is the business plan which you submitted to representatives of Twin Disc Corporation.

A Well, I prepared this, but I believe it was at the very end of the negotiations, and I gave this to Mr. Gibson.

Q But you submitted it prior to the time of the actual acquisition of the shares and the execution of the written agreement between you?

A I don't recall if that was so, or after the

agreement.

Q But you are not prepared to deny that it was given before the execution of those agreements, are you?

MR. BOBBE: Your Honor, I object to the form of the question.

THE COURT: Overruled. Do you say that this was not given, this plan was not given before the contract or the deal requiring the transfer of the stock and your contract of employment being entered into?

THE WITNESS: I don't recall whether it was before or after the signing of the contracts. If it was before, it was very shortly before, but I don't recall.

BY MR. HUGHES:

Q Well now, I'll try to refresh your recollection. Do you see the kind of letterhead that is on this document?

A Yes.

Q Now, that letterhead was the kind of letterhead that LRM had prior to the merger, isn't that correct?

A Yes.

Q Does that refresh your recollection that you gave this document to repreaentatives of Twin Disc prior to

the acquisition?

A No, sir, it does not because we used the same letterhead for some time after the acquisition as well.

Q And regardless of when you gave this document to representatives of Twin Disc, when in fact did you prepare it?

A Well, I prepared it immediately before giving it to Mr. Gibson.

Q Well, can you specify with any further degree of certainty the approximate date on which you gave this to Mr. Gibson?

A Well, it would be approximately July, 1968, or thereabouts.

Q When did the discussions begin?

MR. POBBE: What discussions?

Q The discussions looking towards the acquisition.

A They began in December of 1967.

Q And you say that it was not until at or close to July of 1968 that you handed this document to Mr. Gibson, is that what you are saying?

A I'm saying I don't recall when I gave it to him, but it could have been on or about that time, in July.

Q And it could have been much earlier than that,

isn't that correct?

A Well, not much earlier. It could have been earlier, but not much earlier.

Q Well, how much earlier in your recollection?

A Could it have been?

Q Yes.

A A few weeks, perhaps.

MR. HUGHES: I offer this document in evidence.

MR. BOBBE: May I see it?

I object to its materiality, your Honor.

THE COURT: Let me see it.

MR. BOBBE: All the negotiations were merged in the contract that was entered into on July 3, 1968.

THE COURT: Overruled.

MR. BOBBE: May I note the further objection as being immaterial and irrelevant and not within the pleadings?

THE COURT: Overruled.

***** (Document above referred to was thereupon marked Defendant's Exhibit B in evidence as of this date.)

MR. HUGHES: Your Honor, may I read from this document and call the jury's attention to certain items?

THE COURT: Yes.

(Whereupon, Mr. Hughes read Defendant's Exhibit B in evidence to the jury.)

MR. HUGHES: Annexed to this document, and constituting a part of the document is a page headed "Projected Statement, 1968. Sale of Products, $300,000."

There are other intervening figures. "Net Profit, $50,000."

MR. BOBBE: May I see that, please?

I would like to read another portion of this, your Honor.--

THE COURT: Yes.

MR. BOBBE: (Continuing) -- which is stricken out on this exhibit.

"Background of principals:"

MR. HUGHES: I'll concede tnat that was not stricken out at the time we received it.

MR. BOBBE: Yes.

(Whereupon, Mr. Bobbe read the document annexed to Defendant's Exhibit B in evidence to the jury.)

MR. BOBBE: Now, the document indicates that there are detailed resumes of certain peoples' backgrounds appended to this. I don't find that appended.

MR. HUGHES: Neither do I.

MR. BOBBE: All right.

BY MR. HUGHES:

Q Mr. Lowell, you were the author of Exhibit B, not Mr. Everett, is that correct?

A Yes.

Q Now, after the acquisition of LEM by Twin Disc, did LEM go on a fiscal year basis for accounting purposes?

A Not immediately, but some months afterwards, that was done.

Q And when that accounting system was put in, it was related back to the beginning of what was to be the fiscal year from July 3, 1968 to June 30, 1969, is that correct?

A No, I don't believe it was done that way, Mr.

Hughes.

Q Well, you tell me how it was done.

THE COURT: How was what done?

Q How you switched from a calendar year basis accountingwise to a fiscal year basis? I'm only interested in the fact that you went on a fiscal year basis. Is that correct?

A LEM's accountant made the arrangements. It was necessary to clear this with the Internal Revenue Service, and so there was a change in the reporting year made some months after the acquisition, but I don't believe the change was made retroactive to July, 1968.

Q In any case, there came a time when you went on that fiscal year basis and thereafter you continued on a fiscal year basis until the time of your discharge in 1972, is that correct?

A Yes, I would say so.

Q Now, in the fiscal year ending June, 1969, did LEM operate at a profit?

A Would you repeat the dates, sir?

MR. HUGHES: Would you read the question back?

(Whereupon, the reporter read the ques-

tion as requested.)

A I believe not.

Q You know that it operated at a loss, don't you?

A Well, the net results of the operation were a loss. There were profit from sales. That's why I'm uncertain as to how to answer you.

Q Are you telling his Honor and the ladies and gentlemen of this jury that this company, LEM, operated at a profit during the fiscal year ending June, 1969, is that what you are saying?

A No, sir. That's not what I'm saying.

Q They operated at a loss, didn't they?

A The net end result was a loss, yes.

THE COURT: Well, isn't that the way you determine whether you make money during a year, a fiscal year? If you make money on one or a hundred sales, but the expenses of operating exceed that, you operated at a loss. Isn't that correct?

THE WITNESS: That's correct. I was trying to make that distinction, your Honor.

THE COURT: I see.

Q And the point that I am making is that you

operated at a loss, is that right?

A Overall loss, yes.

THE COURT: For the fiscal year ending June of '69?

THE WITNESS: Yes.

Q About how much was that loss?

MR. BOBBE: Your Honor, I must object to this. In the first place, it's not proper cross examination, and in the second place, it's immaterial and irrelevant under the terms of the contract whether they operated at a profit or at a loss.

THE COURT: Well, it might be the contract doesn't say anything about how much profit was to be made, but I think it has a bearing on the overall issue as to whether or not he employed his best interests in the operation of the business and whether he, himself, complied with all of the terms and conditions of the contract in that respect. That's the purpose for which I'm admitting it.

MR. BOBBE: For that limited purpose, your Honor?

THE COURT: Yes, and I tell the jury now that I don't see anything in the contract that says that this Plaintiff was required to make a profit as a condition before receiving salary.

MR. HUGHES: I understand that, but there is a broader issue than that.

THE COURT: Well, I'm admitting it on the broad issue.

MR. BOBBE: And I also object to it on the grounds that it is not proper cross examination, and as making him his own witness.

THE COURT: Well, I think it's encompassed within the testimony that has been adduced here on direct examination, having a bearing on what was testified to previously by this witness on his conduct, and on his directing of the affairs of this corporation, the LEM Corporation. Overruled.

MR. HUGHES: Would you read the question back, please?

(Whereupon, the last question was read by the reporter as requested.)

A I don't recall the amount.

MR. BOBBE: Your Honor, we'll save a great deal of time if we concede whatever figures Mr. Hughes wishes to present in that regard, saving my objection on the grounds as I have already stated.

THE COURT: Yes.

MR. BOBBE: So If Mr. Hughes wants to present that testimony without questioning the witness, I'm willing to accept it.

MR. HUGHES: Well, I'm partially willing to accept that suggestion, but I want to pursue some lines of inquiry because I want to test this witness's general recollection on what appears to me to be significant facts.

BY MR. HUGHES:

Q Do you have any recollection of the approximate amount of that loss?

A Approximately $25,000 or $30,000 is what I recall.

Q And did you operate at a loss in the fiscal year ending June, 1970?

A Yes.

Q How much, if you recall?

A I don't recall again.

Q Did you have an operating loss in the fiscal year ending June, 1971?

A Yes.

Q Do you recall the amount?

A No, I do not.

Q Was there an operating loss in the fiscal year ending June, 1972?

A Yes, there was.

Q Do you know what the amount of that loss was?

A I have an approximately idea. It was about $50,000 to $55,000.

MR. HUGHES: Now, your Honor, I'm going to adopt Mr. Bobbe's suggestion and offer in evidence the financial statements of LEM Instrument Corporation, and on the first one it is described as the financial statement for the year ending June 30, 1969, prepared by Lybrand, Ross Bros. & Montgomery.

MR. BOBBE: I renew the same objection as before, to the competency and relevancy, and as to whether it is proper cross examina-

tion.

THE COURT: Overruled on that basis.

*****

(Document above referred to was marked Defendant's Exhibit C in evidence as of this date.)

MR. HUGHES: I make a similar offer of a similar statement by the same accounts for the year ending June 30, 1970.

MR. BOBBE: Same objection.

THE COURT: Overruled.

*****

(Document above referred to was thereupon marked Defendant's Exhibit D in evidence as of this date.)

MR. HUGHES: I offer a similar statement for the year ending June 30, 1971.

MR. BOBBE: Same objection.

THE COURT: Same ruling.

*****

(Document above referred to was marked Defendant's Exhibit E in evidence as of this date.)

MR. HUGHES: I offer a similar statement for the fiscal year ending June 30, 1972.

MR. BOBBE: Same objection.

THE COURT: Same ruling.

***** (Document above referred to was marked Defendant's Exhibit F in evidence as of this date.)

MR. HUGHES: Your Honor, may I draw the jury's attention to certain figures?

THE COURT: Yes.

MR. HUGHES: This is the accountant's statement, and one of the attachments to the statement is the LEM Instrument Corporation statement of deficit for this year ending June 30, 1969, and the bottom line figure is a deficit of $86,456.93.

Also as a part of that Exhibit there is an operating statement that shows the net sales for the year of $23,278.50, and a net loss before Federal Income Tax of $56,420.94. This was the first year of operations after the takeover, and after that plan was delivered to Mr. Gibson.

BY MR. HUGHES:

Q Is that correct, sir?

A Well, I believe so. I don't have that.

MR. HUGHES: Now, for the year 1970 the report shows net sales of $985.50.

MR. BOBBE: What is that figure?

MR. HUGHES: The net loss before Federal Income Tax is $63,056.79, and the accumulated statement of deficit at the end of the year is $121,005.60.

For the year 1971 the net sales are $26,339. The net loss before Federal Income Tax is $75,168, and the accumulated deficit is $198,174.

For the year 1972, the net sales are $55,370, and the net loss is $60,016, and the accumulated deficit at the end of the year is $256,190.

BY MR. HUGHES:

Q Now Mr. Lowell, during the time when LEM was a subsidiary of Twin Disc, and you were the president of LEM, did you consider that its operating record was a satisfactory one?

MR. BOBBE: Well, I object to that as calling for a conclusion and immaterial and irrelevant.

THE COURT: On cross examination he may do it. Overruled.

A I think the level of activity was satisfactory. I think we -- the progress that we made in several areas was satisfactory. Certainly the losses were unsatisfactory.

Q Did you ever state in words or in substance to any of the people either at Twin Disc or at LEM that the sales of LEM were horrible? Did you ever use that characterization?

A I may have.

Q Did you?

A I don't recall, but I may have. It's possible, quite possible.

Q I show you a paper on the letterhead of LEM Instrument Corporation signed "Frank" and ask you if that is a memorandum which you prepared and submitted to the Board of Directors.

A Yes, this is a copy of one of my monthly reports.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: May I see it?

No objection.

***** (Report above referred to was marked

Defendant's Exhibit G in evidence as of this date.)

MR. HUGHES: Your Honor, may I call certain portions of it to the attention of the jury?

THE COURT: Yes.

MR.HUGHES: I'm not going to read the whole text. There is one heading, one paragraph headed "Sales and Orders."

Sales for the month of December were $5,310.

THE COURT: What year is that, Mr. Hughes?

MR. HUGHES: Well, the memorandum is dated January 15, 1972, and therefore, obviously, it speaks of December of 1971.

"Sales for the month of December were $5,310, which compares favorably with the projected sales figure of $5,000. Total sales for six months were $20,178.20, showing some improvement over last year's six-month total of $14,744.15, still horrible, but getting better.

"Several orders on the books at the end of December are scheduled for shipment in January.

"Sales Reps: Recruitment of sales representatives is behind projections but is underway and is still my highest priority except for filling orders and quoting."

BY MR. HUGHES:

Q I show you another memorandum dated June 16, 1969, and ask you whether you sent this memorandum to the members of the Board of Directors of LEM at or about the date it bears.

A Yes, this is a copy of my monthly report.

Q With an attachment of certain financial figures?

A I'm sorry, I didn't look at that.

Well, this appears to be the accountant's report, yes.

Q Is that a monthly report?

A Yes.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: May I see it?

Same objection as heretofore made, your Honor.

THE COURT: Same ruling as heretofore made.

*****

(Report above referred to was marked Defendant's Exhibit H in evidence as of this date.)

MR. HUGHES: I would like to read a portion of that, your Honor.

THE COURT: Yes.

MR. HUGHES: It's dated June 16, 1969, addressed to Messrs. Batten, Howell, Gibson and Beaton. There is a paragraph headed: "1, Sales. (a) There were no orders booked during May. This has been particularly disappointing since a number of previously quoted jobs were expected."

Now, attached are some financial figures and among them is an income statement for the eleven months ending May 31, 1969, and it has "Sales, current month, $30. Eleven month accumulation, $22,930," and the current net loss for that month is $10,526.87, and the accumulated eleven month total was $47,801.79.

BY MR. HUGHES:

Q I show you a memorandum signed "Frank" dated September 10, 1969, on the letterhead of LEM Instrument Corporation, addressed to the members of the Board of Directors, and I ask you whether you sent that memorandum, and in connection with this question, I call your attention specifically to certain handwritten notations on the second page of that memorandum, and ask you whether you can identify the handwriting.

A Well, this memorandum of two pages, dated December 10, 1969, appears to be a copy of my monthly report. I do not recognize the handwritten notes. They are clearly not in my handwriting.

There are two other pages attached to that.

Q They are attached to the memorandum, yes.

A Yes.

Q Do you have any comment on them?

A The balance sheet as of August 31, 1969 appears to be the balance sheet as prepared by LEM's accountant. The last sheet is entitled "Minutes of a meeting of the Board of Directors of LEM Instrument Corporation." This appears to be, to the best of my recollection, a copy of the minutes of the meeting held on the first day of October, 1969.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: Same objection.

THE COURT: Same ruling. Overruled.

MR. BOBBE: It is understood, however, that the handwriting is not the handwriting of Mr. Lowell. It's not claimed that it is?

MR. HUGHES: No, it isn't claimed that it is. The witness said it isn't his.

*****

(Document above referred to was thereupon marked Defendant's Exhibit I in evidence as of this date.)

MR. HUGHES: I would like to read certain portions of this, your Honor.

THE COURT: That's another monthly report, is it?

MR. HUGHES: It's a report dated September 10, 1969, addressed to Messrs. Batten, Howell, Gibson and Beaton, who were the other members of the Board.

THE COURT: All right.

MR. HUGHES: Paragraph one, "Sales and Reps. The sales picture continues to be

disappointing. Opportunities to quote are not forthcoming at a satisfactory rate even though our advertising and publicity are generating large numbers of catalog requests. Somehow I must solve the problem of finding qualified sales reps.

"I'm convinced that this is the only practical way to sufficiently extend my own personal sales efforts. I am presently considering reps for the Ohio-Indiana-Kentucky area and replacements for the New York-New Jersey areas.

"In addition, Bill Gibson has suggested a possibility for the Illinois-Missouri area."

The financial statement shows a net loss for the month of August of $1,964.69, and an accumulated loss for the two months, that is, July and August, of $5,831.44.

MR. BOBBE: I would like to read the minutes of the meetings of the Board of Directors of LEM Insttument Corporation attached hereto.

"A meeting of the Board of Directors was

held at the Pickwick Motor Inn, Woodbury, New York, on the 1st day of October, 1969. The meeting was duly called to order by the Chairman. The secretary called the roll of the directors and reported that all were present. The secretary then read the minutes of the meeting of the Board which had been held on the 22nd day of July, 1969.

"By motion duly made, seconded and carried, it was resolved that the aforesaid minutes are approved as read, and it was further resolved that the financial statements for the year ending the 30th of June, 1969, as reported by Lybrand, Ross Bros. & Montgomery are hereby incorporated as a part of the aforesaid minutes. At present it has been reported by the Board on the financial results of the business of the Corporation for the first two months of the current fiscal year, and also described the progress made on the encoder development project since the previous meeting of the Board. The results and progress were found satisfactory to the Board."

The minutes are dated the 1st of October, 1969, and it's signed by Robert A. Everett, Secretary.

BY MR. HUGHES:

Q Mr. Lowell, I show you another memorandum dated November 17, 1969, and ask you whether that is a copy of a memorandum which you sent to the members of the Board at LEM.

A Yes, this is a copy of my monthly report for that period.

MR. HUGHES: I offer it in evidence.

THE COURT: What is the date of that, please?

MR. HUGHES: November 17, 1969.

MR. BOBBE: Same objection.

MR. HUGHES: I'll substitute this copy. I think this is a clearer copy.

MR. BOBBE: All right. Same objection, your Honor.

THE COURT: Overruled.

***** (Document above referred to was marked Defendant's Exhibit J in evidence as of this date.)

MR. HUGHES: Your Honor, I would like to call the jury's attention to a portion of this exhibit. It is dated November 17, 1969, signed by Mr. Lowell, on the letterhead of LEM Instrument Corporation, and it says in a heading here, "Sales and Quotations."

"While the sales picture continues to be unsatisfactory, requests for quotations are developing. Perhaps, the drought is over."

BY MR. HUGHES:

Q Mr. Lowell, isn't it a fact that Twin Disc Corporation made advances of cash to LEM during the period between the date of acquisition and the date when you were discharged?

A Cash in the form of checks, yes.

Q Yes, and you put them in the bank and they cleared?

A Deposited to LEM's account, yes.

Q So you wound up with cash, right?

A Yes, I just didn't understand you, Mr. Hughes.

Q And those cash payments took the form of, in part of purchase of stock of LEM, additional shares of LEM and in the form of loans, is that correct?

A Yes, that's correct.

Q Do you recall approximately how much the total of those advances was?

MR. BOBBE: Well, I'll accept counsel's figures if he wishes to state them.

MR. HUGHES: Well, I would like to have an answer. I would like to know whether the witness recalls this kind of a fact.

THE COURT: Yes, you don't have to take the concession.

MR. HUGHES: I would like to know if he recalls this fact.

THE COURT: Yes.

A Approximately, yes.

Q Well, what is the approximate figure?

A Approximately $300,000.

THE COURT: Was that November now?

THE WITNESS: In total.

THE COURT: In November?

THE WITNESS: As of October, 1972.

Q Well, isn't the figure $482,000 more correct?

A It may be, I don't recall. It could be.

Q You don't dispute that?

A No, sir, I do not.

THE COURT: That's the overall loss?

THE WITNESS: No, not the loss, your Honor.

THE COURT: What?

MR. HUGHES: These were infusions of capital.

THE COURT: I see.

THE WITNESS: In the form of equity and loans.

MR. BOBBE: Combined equity and loans.

BY MR. HUGHES:

Q Now, during all this period of the course LEM was losing money, was it not?

A Yes.

Q And during this period you were receiving salary at the rate of $35,000 per annum, is that correct?

A That's correct,

Q And during the whole period that you were employed by LEM, after the takeover and up to your discharge, was approximately $150,000, was it not?

A That sounds about right.

THE COURT: Excuse me. I want to

get that again. Is that the loss up to the time that you --

THE WITNESS: No, the total of salaries paid to me up to October, 1972.

THE COURT: Approximately $150,000, is that right?

THE WITNESS: I believe that was the number, yes.

THE COURT: Sorry, I was doing something else.

MR. HUGHES: I think, your Honor, at one point you asked, or I thought I understood you to ask what the combined loss was on those Lybrand, Ross Bros. & Montgomery figures, and that was, subject to correction, if I am wrong, $255,000.

THE COURT: $256,190.

MR. HUGHES: Yes, that's right.

BY MR. HUGHES:

Q Now, between 1968 and 1972, did LEM have occasion to employ a Mr. Samuel?

A Yes.

Q And a Mr. Coruzzi?

A Yes.

Q And, of course, Mr. Everett continued on after the takeover, so he was also an employee during that period, is that right, 1968 to 1972?

A Yes.

Q About how many other people did LEM employ during this period?

A Four or five, I believe.

Q Do you recall when you hired Mr. Coruzzi or approximately when? I don't want to pin you down to an exact date.

A Sometime in the early part -- perhaps, January or February of 1971, I think.

Q Did you fire him?

A Yes, I did.

Q When did you ~~fire~~ hire Mr. Samuel?

A Either late in 1968 or the early part of 1969.

Q Did you fire him?

A When he finally left he resigned.

Q You say you did not fire him, is that correct?

A Ever, or when he left?

Q Ever.

A Oh, no, I didn't say that. I said when he finally left, he resigned.

Q I asked you did you fire him. I want an answer. Did you or didn't you?

A Well, I fired him, he returned, and then later he resigned.

Q You fired him,and then he came back, is that right?

A Yes, that's correct.

Q He came back at Mr. Everett's request, is that correct?

A That is correct.

Q How long did he remain thereafter?

A A month or a month and a half.

Q And then left, is that correct?

A Resigned, yes.

Q But the sequence was that you fired him, Mr. Everett persuaded him to come back, and then he left, correct?

A You left some steps out of the sequence which I think are equally significant, but that was the general sequence.

MR. HUGHES: I move to strike that out, your Honor.

THE COURT: Strike that out as not being responsive. You fired him, Everett brought him back, and he stayed a month and a half and then Samuel resigned, is that it?

THE WITNESS: That's not correct, your Honor then. I must say that that's not correct.

THE COURT: Well, say it isn't then.

A That is not correct.

Q We'll go over it. You fired him?

A Yes.

Q And Mr. Everett persuaded him to come back, is that right?

A I don't know if that's right.

Q Didn't you tell us a moment ago --

A I'm trying to be precise now. Mr. Everett persuaded him and me both that he should come back and so I agreed that he should come back.

Q So Mr. Everett persuaded both you and him -- was that the point of distinction that you were concerned about that hadn't gotten across, that he also persuaded you to have him come back?

A No, that was not the point, Mr. Hughes.

Q Well, in any case, you fired him and Everett persuaded both you and him that he should come back, is that correct?

A That is correct.

Q And he stayed for a month and then resigned, is that correct?

A That is correct.

Q Now, is there anything in there that doesn't cover that whole situation basically?

A Yes.

Q What else is there?

A That at the time he resigned both Mr. Everett and I attempted to convince him to remain on with the company, and he refused.

Q And said in effect he couldn't get along with you, isn't that correct?

A No, sir. That's not what he said.

Q But in any event, having come back and completed certain work at the end of a month he resigned, is that correct?

MR. BOBBE: Your Honor, I object to that. He's putting words in the witness's mouth.

THE COURT: At the end of a month or month and a half I think he said initially.

Q All right, a month and a half, is that correct?

A Yes.

Q Now, did there come a time when you fired Mr. Everett?

A Yes, there did.

Q And when was that?

A I believe that was August 11, 1972.

Q And at any time prior to August, 1972, did you fire, or tell Mr. Everett in words or in substance that he was fired?

A No, I don't recall. I'm sure I never said it before then.

Q Now, you fired him on August 11, 1972, is that correct?

A If that was a Friday, yes.

Q You recall that it was a Friday, is that correct?

A Yes, sir.

Q And he had been back for a week following a vacation, is that correct?

A He had come back from vacation that Monday,

the Monday of that week.

Q And was there Monday, Tuesday, Wednesday, and Friday, and you fired him on Friday?

A Well, he wasn't at the plant full-time that entire week.

Q You say he wasn't there the full time? What do you mean by that? Explain it to his Honor and the jury.

A Well, he left early in the afternoon on two days, and I believe he came in late and left early on the Thursday of that week.

Q Now, the Friday that you fired him was the Friday on which you intended to commence your vacation, is that correct?

A Yes.

Q And when you fired him you left the office that day intending to go on your vacation, is that correct?

A No, I can't say that was correct. I left the office wondering whether I should in fact go on vacation.

Q In any case, you went home, is that correct?

A Oh, yes.

Q You didn't come into the office the following Monday, did you?

A No.

Q You didn't come in the following Tuesday, did you?

A No.

Q In fact, you didn't come in for a two-week period, isn't that correct?

A That is not correct.

Q When during that two-week period did you come into the office?

A On at least two different occasions, late in the afternoon.

Q During a part of the day, is that correct?

A Yes.

Q When you say late in the afternoon, what time in the afternoon?

A Five-thirty, perhaps, or quarter to six.

Q And this was after closing time, is that right?

A Yes.

Q Nobody else was there but you, is that right?

A No, my wife was with me, but no one from LEM was there, yes.

THE COURT: Well, she didn't work for LEM, did she?

THE WITNESS: No, sir, she didn't.

Q When you fired Mr. Everett on that August 11th, who remained on the job at LEM on the following Monday morning?

A Mr. Gay and Mr. Scaar, our two other employees.

Q What were Mr. Gay's duties?

A He was a machinist, responsible for manufacturing machine parts.

Q Wasn't the responsibility for the manufacture of parts Mr. Everett's?

A Well, Mr. Gay was the man who did the actual work as the machinist.

Q Was the responsibility for the manufacturing of parts within Mr. Everett's realm?

A Well, yes, but --

Q And Mr. Gay was under his supervision, is that correct?

A That's correct.

Q Now, was Mr. Gay an officer of the corporation?

A No.

Q Was he a director of the corporation?

A No.

Q Now, Mr. Scaar, what were his duties?

A His duties were to assist in the assembly of our products, to conduct tests on them, and to work on the

development of new or improved products.

Q And also up to that point under the supervision of Mr. Everett, is that correct?

A No, he was under my direct supervision.

Q Was he an officer of the corporation?

A No.

Q Was he a director of the corporation?

A No.

Q So that I'm sure about this, during the next two weeks the only times that you were at the plant was two days in the after hours, sometime after five-thirty, is that right?

A Yes, I came in to read the mail essentially.

Q Now, when you fired Mr. Everett, did you notify anybody on the Board of Directors that you had taken that action?

A That day you mean, Mr. Hughes?

Q That day, yes.

A No, sir.

Q Before you fired him, did you make any attempt to contact anybody on the Board of Directors and tell them that this was what you were going to do?

A No.

Q And you wrote out a written letter expressing in writing the fact that he was being discharged, is that correct?

A Addressed to Mr. Everett you mean?

Q Yes.

A Yes.

MR. HUGHES: Now, that's an exhibit, your Honor.

MR. KHEEL: Plaintiff's Exhibit 9.

Q This letter is dated August 11, 1972, Plaintiff's Exhibit 9. You have already identified it as a letter that you wrote. How did you deliver that to Mr. Everett?

A Either gave it to him by hand or left it on his desk, I don't recall which.

Q And in this letter you say, "This action is being taken as a result of your continuing failure to perform your duties in a satisfactory manner."

First let me interpose. You had no difficulty with the word "Satisfactory" as you used it in this letter, did you?

A I know what I meant by it, yes.

Q Now, what did you mean by his continuing

failure?

A For some months prior Mr. Everett had not been doing his job in what I would consider a satisfactory manner.

Q Specifically, what are you talking about? What is it that Mr. Everett wasn't doing in a satisfactory manner?

A Well, Mr. Everett was frequently absent from work, either part days or complete days, in fact both at various times, and he would never explain these absences to me even when I requested that he do so.

He spent a great deal of his time in matters that weren't related to the company's business. He would have visitors in, and he would talk with them, and he was on the telephone a great deal. He would not perform the duties that I felt were his, and even when I asked him specifically to do certain things. He ~~incited~~ incited the other employees occasionally by teasing them. Most specifically he would tease Joe Samuel a great deal. He refused --

Q I want to understand that. What do you mean by teasing Joe Samuel? What are you talking about? Tell us what you mean.

A Well, the best illustration of what I can mean is this: Joe Samuel is a black man, and upon my approach,

whenever Everett and Mr. Samuel were together Mr. Everett would say something like, "Here come the white man boss."

Now, my relationship with Joe Samuel was a long standing friendly one and I felt that that was highly improper for Everett to say such a thing, and it was inclined to upset Joe whom I knew very well. That's just one illustration.

He would tease Joe Samuel in various other ways about the performance of his duties, about Joe's personal life, and it was a steady stream of such things.

Q And it's your testimony now to his Honor and the ladies and gentlemen of the jury that this went on between Mr. Samuel and Mr. Everett, is that what you are saying?

A In my earshot, yes.

Q And the Mr. Everett to whom you are referring is the Mr. Everett that is sitting here in the Courtroom now, is that correct?

A Yes, Bob Everett.

Q Now --

A Excuse me, Mr. Hughes. I haven't finished, I don't think, my answer to your question.

Q By all means do, and take your time doing so.

A I would say that for about a year perhaps

preceding this incident of August 11th Bob Everett refused to stay beyond four-thirty when he did stay and didn't leave earlier. On several occasions, I asked him to come to work with me on Saturday to complete some jobs that had to be shipped out, and he would always refuse telling me that he was, to quote him, "I'm vice president and should be taking up golf, not working long hours on Saturdays," and at first, I didn't realize what he was saying. I accepted it as being a jocular remark, but he increasingly began to act as if he felt that way.

Q When did this start?

A I would say that when I thought about it after August 11th, I realized that it had been going on for about a year although I hadn't kept any such mental notes until I deliberately thought about it.

Q Now, didn't you say on your direct examination when this question of your discharging Mr. Everett was explored, that up to the time of that discharge your relationships with him were harmonious and this came to you as, I think you used the word " A shock" -- that you had this episode? Didn't you say that in words or in substance to his Honor and the members of this jury?

A I don't recall using the word shock, but I --

Q Well, was it a shock?

A Was it a shock?

Q Yes.

A I think it was a shocking thing, yes, because Bob Everett and I were what I thought good friends and associates, and that also explains why for a period of a year I didn't really understand in my own mind what was happening as far as Bob Everett's efforts are concerned.

Q Now, did Mr. Everett have a written contract with the company?

A Oh, yes.

Q And wasn't his contract in all respects identical to yours except for the amount of compensation?

MR. BOBBE: I object to that as calling for the contents of a written instrument.

THE COURT: Sustained.

MR. HUGHES: I think you are quite right. May I have the contract?

THE COURT: I think we will suspend at this time, gentlemen. It's one o'clock, so we will go to lunch.

I have to repeat to the jury as a matter of caution that you are not to discuss the

case among yourselves during the recess period, or to form any opinion on it. Keep an open mind on all of the evidence, and please return at two o'clock.

(Whereupon, a luncheon recess was declared.)

AFTERNOON SESSION

(Roll call of jury.)

THE COURT: All right, you may continue.

MR. HUGHES: May it please your Honor, when we recessed for lunch I was about to offer, and I do now offer in evidence, the employment contract between LEM and Mr. Everett.

THE COURT: Show it to your adversary.

MR. BOBBE: No objection.

THE COURT: Let it be marked.

*****

(Contract between LEM and Mr. Everett was marked Defendant's Exhibit K in evidence as of this date.)

MR. HUGHES: Now, may I have Exhibit 9 please, and Exhibit 1 also?

CROSS EXAMINATION

BY MR. HUGHES: (Continued)

Q Mr. Lowell, I'm going to present to you Plaintiff's Exhibit 2 in evidence which you have identified as your employment contract, and I'm also going to place in front of you Exhibit K which is Mr. Everett's employment contract, and I'm going to call your attention specifically to paragraph one of those agreements, and except for the names, those paragraphs are identical in text, is that not right?

A Paragraph one, Mr. Hughes?

Q Yes.

A No, they are not identical because in addition to the names they specify different titles.

Q Excuse me. You are specified as the president and he is vice president?

A I'm specified as general manager and president.

Q Correct.

A And Mr. Everett is specified as vice president.

Q And in this agreement which you signed and which he signed, you both agreed there was an agreement to employ you for a term of seven years, as long as "He shall faithfully and diligently perform the duties of his employment" -- is that correct, in both agreements?

A "And shall engage in no activity which"--

Q Well, you are going beyond.

A Yes, I'm sorry. I was reading it out loud. Yes.

Q What I recited appears in both of these agreements, is that correct?

A Yes, it does.

Q Now, on August 11, 1972, you wrote Exhibit 9 in evidence which is the letter discharging Mr. Everett, is that correct?

A Yes, I wrote that letter.

Q At the time when you wrote that letter, there was no doubt in your mind, was there, that Mr. Everett could be discharged for, "Failure to perform your duties in a satisfactory manner?"

MR. BOBBE: You mean his duties.

THE COURT: He's quoting.

MR. HUGHES: Quote, "For failure to perform your duties in a satisfactory manner."

A I'm not sure I understand your question, Mr. Hughes.

MR. HUGHES: Would you read the question, please?

(Whereupon, the reporter read the last question as requested.)

A Perform his duties I presume you mean.

THE COURT: Well, your letter says "Your duties," referring to Mr. Everett.

A You meant his duties?

Q Yes.

A Well, I didn't really think about it, but -- no, there was no doubt in my mind, if I had thought about it.

Q Well, having thought about it there is no doubt in your mind, right?

A Right.

Q Now, I show you Plaintiff's Exhibit 16 in evidence and ask you when you prepared that document?

A It's dated 11, August, 1972, so I prepared it on or about that date.

Q Well, did you prepare it on August 11, 1972?

A Well, either that day or the day before, yes. I would assume it was on that date.

Q Do you recall when you sent it to the Board of Directors?

A Well, I would also assume it was on or about August 11, either that day or the day following.

Q Well, either that day or the day following?

A Or the day following, yes.

Q And would you say that it was your custom to send these documents either the day they were prepared or the day following their preparation?

A In general, I would mail them immediately after preparing them. You jog my memory now, Mr. Hughes, so I would say that I mailed this on August 11th.

Q Yes. Now, this is a report to the Board of Directors, is that correct?

A Yes, it is.

Q Is there any mention in that exhibit, Plaintiff's Exhibit 16, of the fact that you had fired Mr. Everett on that day?

A No, that's why I say you have jogged my memory and why I recall this one.

Q Well now, just a minute. Is there any mention of it?

A No, there is not.

Q All right, thank you.

Now, I show you a letter dated August 28th and ask you whether you -- on the letterhead of Twin Disc Corporation -- and ask you whether --

THE COURT: What year, please?

MR. HUGHES: Excuse me, August 28, 1972.

Q (Continuing) -- and I ask you whether you received that letter from Mr. Batten.

MR. BOBBE: I have the original.

A Yes, I received this letter.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: No objection.

THE COURT: Mark it, please.

***** (Letter above referred to was marked Defendant's Exhibit L in evidence as of this date.)

MR. HUGHES: Your Honor, I would like to read this to the jury.

THE COURT: All right.

(Whereupon, Mr. Hughes read Defendant's Exhibit L in evidence to the jury.)

BY MR. HUGHES:

Q Now, did you write a letter to Mr. Batten on August 31?

A Yes, I believe I did.

Q I show you this letter and ask you if that's

the letter you wrote.

A Yes, it is.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: No objection.

*****

(Letter dated August 31, 1972 was marked Defendant's Exhibit M in evidence as of this date.)

THE COURT: May I look at it, please?

MR. BOBBE: I'll furnish your Honor with a copy, if you wish.

THE COURT: No, that's all right. Ijust want to get the chronological order here, the date and so on.

MR. HUGHES: Your Honor, I am not going to take the time at this time to read this to the members of the jury, but I intend to come back to it at another phase of the case.

THE COURT: Very well.

BY MR. HUGHES:

Q Mr. Lowell, from time to time between 1967 and 1972, did you make sales projections for the sales of LEM?

A I made projections of costs of operation and

profits based on certain assumed levels of sale, yes.

Q Well, the document that I am referring to -- I withdraw that.

The projections that I am referring to are written documents. Did you make such written projected statements of sale and other data?

MR. BOBBE: I think you should show it to the witness if it's a written document.

THE COURT: Well, first he is entitled to an answer yes or no, laying a foundation for the introduction of the paper.

A I made written projections of costs of operations and profits based on certain assumed levels of sales.

THE COURT: Assumed by whom? By you?

THE WITNESS: No, assumed that if those levels of sales were reached, then the costs of sales and profits resulting therefrom --

THE COURT: Well, wait. Wasn't the indication of the number of sales your opinion about the LEM Corporation being able to achieve that level of sale?

THE WITNESS: No, sir. That's why I'm drawing that distinction.

THE COURT: All right.

BY MR. HUGHES:

Q But you prepared these documents, did you not?

A Well, I don't know which documents.

Q Well, in the interests of saving time, I show you four pieces of paper, and I ask you to take a look at them and tell me first as to the first one, which bears the date 4/8/69 -- and that incidentally was not put on there by you, but is an identifying date -- I ask you if you prepared that.

A Well, other than the date and some written notations I believe, yes, this is my work, but there are written notations on it.

MR. HUGHES: I stipulate that the date was not on the document when it was prepared and that it was put on by us just as a convenient reference.

THE COURT: And other writing on there?

MR. HUGHES: The other writing I will stipulate is not in Mr. Lowell's handwriting.

Q Now, the language here, "Revised projected --"

MR. BOBBE: It's not in evidence, your Honor.

MR. HUGHES: Oh, I beg your pardon.

THE COURT: Show it to counsel.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: Same objection as heretofore mentioned.

THE COURT: You object?

MR. BOBBE: Not to the competency, but merely I press the same objection as to relevancy.

THE COURT: As irrelevant?

MR. BOBBE: Yes.

THE COURT: Overruled.

***** (Document above referred to dated 4/8/69 marked Defendant's Exhibit N in evidence as of this date.)

BY MR. HUGHES:

Q Now, this statement says "Revised projected statement, fiscal year ending 6/30/69". Those are your words, are they not?

MR. BOBBE: Well, he said he prepared

it.

A I prepared it, yes.

Q Now sales through 2/28/69, $28,800, those are your words, are they not?

A I believe so. I don't recall the numbers, but --

Q Well, take a look and see.

A Well, yes. Apparently, they have been changed in ink, and besides, I don't recall the exact numbers.

Q There is no doubt in your mind that you prepared this document, is there?

A With the exception that I took before, there is no doubt, no.

Q And I have agreed with you that the changes were not changes that you made, so except for that, there is no doubt in your mind that this is a document you prepared, isn't that right?

A Right.

Q And you sent this to the members of the Board of Directors, didn't you?

A I don't recall if I sent it to them or gave it to them personally at a Directors' meeting.

Q Well, whether you sent it or gave it, they came

by it, is that correct?

A That's correct.

Q And weren't you telling them that your estimate of sales for the period ending June 30, 1969 was $28,800?

A That was not the purpose of that document.

MR. HUGHES: I move to strike it out.

THE COURT: Strike it out. Yes or no is the answer.

A No, in that case the answer must be no.

Q You weren't telling them that that's what the projection was going to be?

A No.

Q It does say projected statement, doesn't it?

A Yes, sir.

Q And then it is followed up by a statement of sales?

A Yes.

Q $28,800?

A Yes, sir.

Q And you are telling his Honor and the members of the jury that that didn't represent your projection of sales for that period, is that what you are saying?

A It was my projection --

Q Is that what you are saying?

A That's what I'm saying, yes.

Q And this contains, among other things, a figure of net loss of, I think it's $40,800?

THE COURT: I didn't get that question.

MR. HUGHES: $40,800.

THE COURT: Loss?

MR. HUGHES: Loss.

A Yes, it does.

Q Are you telling the members of the jury that that's the loss that you anticipated for that period?

A Yes.

Q I show you this statement --

THE COURT: Let me clarify something in my own mind, sir. You say when you wrote down projected sales, I think I understood you to say in answer to a prior question that when you put that down, that kind of a -- that if you had $28,000 in sales, that the profit or loss would be so and so, is that it?

THE WITNESS: That's correct, your Honor. That was my intention in that.

THE COURT: Even though you say on

the paper this is a projected sale?

THE WITNESS: I don't believe I use that term. It was a projected balance sheet.

THE COURT: May I look at that exhibit, please? There is no doubt that you meant to say that they were going to suffer a loss of $40,000, right?

THE WITNESS: That is correct.

THE COURT: But you say that when you say sales through 2/28/69, $28,000, that's not the same that you anticipated in the value of sales that you would achieve?

THE WITNESS: I think that first item on sales deals with the sales already completed by LEM, and the second figure is the figure that was an unknown.

THE COURT: Well, this says revised projected statement, fiscal year ending 6/30/69, sales through 2/28/69, which is before the date that I mentioned of 6/30/69, and you say $28,000.

THE WITNESS: Yes.

THE COURT: What is that supposed to

represent?

THE WITNESS: Sales already completed as of the date in February, 1969.

THE COURT: And it's not a projection, you say.

THE WITNESS: Right, it is not, not that first statement.

THE COURT: All right.

THE WITNESS: If I may look at it and make certain I'm not adding more confusion --

THE COURT: No, I'm trying to avoid the confusion in my mind.

THE WITNESS: Right. The sales through 2/28/69 represent the sales already completed at the time I prepared this projected statement.

THE COURT: All right. Well, you had those sales already in then, is that what you are saying?

THE WITNESS: Right. Yes, sir.

BY MR. HUGHES:

Q Then in the next line it says additional sales projected, right?

A Right.

Q And there is a figure of $18,000, is that correct?

A That is correct, yes.

Q And does that mean that you were anticipating sales of $18,000 additional?

A It meant that that was my best estimate of sales that the company might achieve, and as a consequence would then end up with a projected statement at the end of the fiscal year as I projected it here.

Q And the whole thing was a projected statement, was it not?

A Yes, sir.

Q What does projected mean as you use the term? What did you mean by projected?

A Well, what I meant was that if the level of sales were achieved then the cost of sales and profit or loss would be as I estimated.

Q And when you say additional sales projected, you are telling his Honor and the members of the jury that that does not represent your estimate of what the sales were going to be, is that what you are saying?

A No, I don't think I meant to say that.

Q Well, what did you mean?

A Well, what I mean was that the first portion of the sales represented actual sales.--

Q Yes?

A (Continuing) -- that were already completed.

Q I'm talking about the second portion.

A Right, and the second portion -- well, I didn't understand you to be talking about that earlier, Mr. Hughes. I thought you were talking about all the sales listed.

The second portion represents my best estimate at that time of the additional sales that the company might achieve, and if we did achieve those sales, then the combined sales would result in this projected statement, projected statement meaning my best intelligent guess at that point in time as to what the financial statement would look like at June 30, 1969.

Q And it would look like a $40,800 loss?

A Yes.

Q I show you another paper and ask you if that's a projected statement of six months ending --

THE COURT: Is that in evidence, that other one?

MR. HUGHES: Exhibit N, your Honor.

THE COURT: That's August 31, 1972?

THE CLERK: 4/8/69.

THE COURT: Wait a minute. Exhibit L was a letter of August 28, '72, a letter of August 31, was Exhibit N, and this one would be N. All right.

MR. BOBBE: What is the date of that?

THE CLERK: 4/8/69. That's the date that Mr. Hughes said he put on it.

MR. HUGHES: Yes, that's correct.

BY MR. HUGHES:

Q I show you a paper on the letterhead of LEM Instrument headed projected statement, six months ending 12/31/69, and I ask you if you prepared that.

A I prepared portions of it.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: May I question the witness?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. BOBBE:

Q Can you identify which portions you prepared, Mr. Lowell?

A I prepared the item called sales of products.

BY MR. HUGHES:

Q And what is that figure?

A $131,000. And, I prepared -- I go through it item by item.

THE COURT: Well, the other items, were they prepared under your supervision?

THE WITNESS: Yes, by the accountant. They were all prepared under my supervision, but by LEM's accountant.

THE COURT: All right.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: I'll make the same objection, your Honor.

THE COURT: Overruled.

*****

(Document dated 12/31/69 was thereupon received and marked Defendant's Exhibit O in evidence as of this date.)

Q And the statement, sales of products, $131,000, appearing on that exhibit, represents your projection of sales of products, is that correct?

A No, it doesn't really.

Q It says sales of products, $131,000, doesn't it?

A Yes, it does, but that does not represent my projection of sales. It was a level of sales that seemed reasonable to expect, and the purpose of this was to explore the cost of such materials and the resulting profit or loss.

Q Well, did you sit down and cerebrate on this subject and come to the conclusion that a projection of sales of products for this period would be $131,000?

A Did I cerebrate? Sure I thought about it, yes.

Q And having throught about it you put down on paper, sales of products, $131,000, is that right?

A That's right.

Q On the document that's headed projected statement six months ending 12/31/69, is that right?

A Yes, sir.

Q And does that statement wind up indicating a projected net profit of $14,900?

A Based on achieving that level of sales, yes.

Q And that's your figure, the $14,900?

A Well, I don't know if it was mine or the accountant's.

Q Based upon the projection of sales on the items of expense prepared under your supervision, is that correct?

A It is correct to say that I estimated that if we achieved that level of sales that the company would show that profit on the bottom line.

Q And you prepared this to show to the Directors, and you actually showed it to them, didn't you?

A Well, I'm sure I did.

Q Yes, and you wanted them to know that your projection of sales was $131,000, didn't you?

A I wanted them to know that if we achieved that level of sales that we would then end up with profits of approximately $14,000. That was the purpose of that projected statement.

THE COURT: Well, at that rate, you could put $500,000, and if you reached that level your profit would be more. Wasn't there some basis for selecting the amount that you selected on that statement?

THE WITNESS: Oh, of course, there is a basis, your Honor, yes.

Q Now in fact, there wasn't any net profit of $14,900 for the six months ended December 31, 1969, was there?

A No, there wasn't.

Q There was a loss, wasn't there?

A Yes, there was.

Q Now, I show you another statement headed projected statement "F.Y." which I interpret to mean for year ending June 30, 1971, and ask you if you prepared that statement.

A No, sir. I did not.

Q You had nothing to do with the preparation of this document?

A Well, I didn't say that. I didn't prepare it.

MR. HUGHES: I ask that document be marked for identification.

***** (Document above referred to was marked Defendant's Exhibit P for identification only as of this date.)

BY MR. HUGHES:

Q Did you prepare any part of Defendant's Exhibit P for identification?

A I did not prepare any part of it, no.

Q Do you know who prepared it?

A I believe Mr. Gibson did.

Q Have you ever seen it before?

A I don't recall if I have or not.

Q I show you a statement on the letterhead of

LEM Instrument Corporation headed projected statement of income and cost of sales, year ending June 30, 1969, and I ask whether you prepared --

MR. BOBBE: '61?

MR. HUGHES: '69.

Q (Continuing) -- whether you prepared that statement.

A In combination with LEM's accountant, I believe I did.

MR. HUGHES: I offer the statement in evidence.

MR. BOBBE: Same objection.

THE COURT: Overruled.

*****

(Document above referred to was marked Defendant's Exhibit Q in evidence as of this date.)

MR. HUGHES: Your Honor, may I just read a portion of this to the jury?

THE COURT: Yes.

MR. HUGHES: It's entitled, "Projected statement of income and cost of sales, year ending June 30, 1969."

"Sales of products, $300,000."

The follows certain items of expense.

"Net profit, $50,000."

BY MR. HUGHES:

Q There wasn't any profit, was there?

A When, Mr. Hughes?

Q For the year ending June 30, 1969.

A No.

Q I show you a paper which is identified as sheet number 5 dated November 29, 1971, and it contains on it certain sales data, and I ask you whether you prepared that material, you and the accountant under your supervision.

A Yes.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: May I see it?

Same objection.

THE COURT: Overruled.

*****

(Document above referred to was marked Defendant's Exhibit R in evidence as of this date.)

MR. HUGHES: Members of the jury, this shows sales of $12[illegible],300 projected for the next eight months, and for all twelve months, $132,600. And, it shows an indicated profit

for eight months of $22,300, and an indicated loss for twelve months of $13,400.

THE COURT: You say loss of $13,400?

MR. HUGHES: Yes. These are projections, your Honor. The actual losses are already a matter of record.

Now, your Honor, we prepared a statement of monthly sales from July, 1968 through August, 1972, by month. This statement was prepared from the monthly statements of LEM's accountant, and Mr. Bobbe has agreed that this is an accurate ~~takeoff~~ statement of those sales subject to examining it and verifying it, and making any corrections. I offer it in evidence.

MR. BOBBE: In the interest of expediency I have consented that if the accountant were called he would testify that these were the correct figures.

THE COURT: Very well.

*****

(Document above referred to was marked Defendant's Exhibit S in evidence as of this date.)

MR. HUGHES: Your Honor, may I call the jury's attention to certain items?

THE COURT: Yes.

MR. HUGHES: This statement shows that April '69 there were no sales. July, '69, no sales. August, 1969, no sales. September, 1969, no sales. November, 1969, no sales. January, 1970, no sales. March, 1970, no sales. May, 1970, no sales. June, 1970, no sales. July, 1970, no sales. December, 1970, no sales. January, 1971, no sales.

BY MR. HUGHES:

Q Mr. Lowell, you testified about engaging a firm by the name of Reynolds or some such name as a sales representative in 1972, is that correct?

A Yes.

Q I show you a letter dated November 17, 1970, and I ask you if that is a letter which you received from Ray Lawson Associates and whether there is appended to it a memorandum in your handwriting.

A Yes.

Q And this Ray Lawson is the same Ray Lawson

firmwhom you engaged in October, 1972, is that correct?

A Yes, I believe so.

MR. HUGHES: I offer that letter in evidence.

MR. BOBBE: I object to its materiality.

THE COURT: Let me look at it.

Overruled.

***** (Letter above referred to was marked Defendant's Exhibit T in evidence as of this date.)

BY MR. HUGHES:

Q I show you a letter dated August 18, 1972, and ask you if that is a letter which you received from Ray Lawson Associates at or about the date it bears.

A Yes.

MR. HUGHES: I offer that in evidence.

MR. BOBBE: Same objection.

THE COURT: May I look at it, please?

Overruled.

***** (Letter above referred to dated August 18, 1972 was marked Defendant's Exhibit U in evidence as of this date.)

Q Going back to Exhibit T in evidence, the

letter of November 17 from Ray Lawson, I call your attention to the first paragraph and ask you whether that was a letter you received after sending literature to Ray Lawson Associates.

A Yes.

Q And that was November of 1970?

A November 17, 1970 is the date on this letter.

Q And two years later in October, 1972, you finally get around to engaging him, is that right?

A How do you mean finally, sir? I think that's an improper question.

MR. HUGHES: I move to strike that.

THE COURT: You have a lawyer here to protect you, sir.

MR. HUGHES: I move to strike out the answer.

THE COURT: Strike it out. Your lawyer didn't object. Do you want to put in an objection on your own?

THE WITNESS: If I may.

THE COURT: Objection is overruled.

BY MR. HUGHES:

Q Would you answer the question, please?

A Would you repeat the question, please?

(Whereupon, the question was read by the reporter.)

MR. BOBBE: Well, your Honor, that's assuming facts not in evidence.

THE COURT: I'll sustain the objection as to the form.

Q Mr. Lowell, you have already told us you engaged that firm in October, 1972, is that correct?

A I don't believe so. Sometime prior to October, 1972.

Q Well, didn't you say just a few moments ago that it was in October of '72 that you engaged them and the other firm of Reynolds and Associates?

A I don't recall saying that, Mr. Hughes.

Q All right. In any event, you now say that it was shortly before October of '72?

A I don't recall the exact date, but it was before October 9, 1972.

Q All right. Now, you fix the date all over again.

A I don't recall the date.

Q Approximately what date?

A Approximately sometime in September of 1972.

Q So it was approximately one year and ten months from the time they told you they were interested in it that you got around to hiring him, is that correct?

A No, that is not correct.

Q In what respect is it incorrect?

A The words, "Got around to" are implying something that isn't correct.

THE COURT: Well, you didn't engage him until September of 1972, is that right?

THE WITNESS: That is correct.

Q I show you a letter on the letterhead of Reynolds and Associates, and I -- withdrawn.

When did you engage Reynolds and Associates?

A Sometime in the summer of 1972.

Q I show you a letter from Reynolds and Associates on their letterhead dated December 17, 1971, and ask you if you received that letter at or about the date it bears.

A Yes.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: Same objection.

THE COURT: Overruled.

*****

(Document above referred to was marked Defendant's Exhibit V in evidence as of this

date.)

MR. HUGHES: I would like to read just a part of this, your Honor.

THE COURT: All right.

(Whereupon, Mr. Hughes read Defendant's Exhibit V in evidence to the jury.)

BY MR. HUGHES:

Q Did you answer that letter?

A I believe I did.

Q Do you have any recollection of having answered that letter?

A I'm virtually certain I did.

Q I show you a letter dated May 19, 1972, and I ask you whether you received that letter from Reynolds and Associates.

A Yes, I did.

MR. HUGHES: I offer that in evidence.

MR. BOBBE: Same objection.

THE COURT: I think I have already indicated why I am accepting these letters, on the question of whether he faithfully and diligently performed his duties and exerted his best efforts on behalf of the corporation.

That's the only purpose I'm taking it, not necessarily for the contents thereof, but on that issue alone.

MR. HUGHES: I understand, your Honor.

***** (Letter dated May 19, 1972 was marked Defendant's Exhibit W in evidence as of this date.)

BY MR. HUGHES:

Q And subsequent to the receipt of that letter, did you prepare this memorandum which I now show you dated May 22, 1972?

THE COURT: May 22?

MR. HUGHES: May 22, 1972.

A Well, I don't think this is as a consequence of that letter, but it was subsequent to that date because this refers to a telephone conversation.

Q Was that a telephone conversation with someone at Reynolds and Associates?

A Yes, I believe I called Reynolds Associates.

Q And this memorandum records the fact of having made that phone call?

A No, it records the fact that during the --

MR. HUGHES: Never mind. I offer it

in evidence.

MR. BOBBE: Same objection.

THE COURT: Overruled.

***** (Document above referred to was marked Defendant's Exhibit X in evidence as of this date.)

BY MR. HUGHES:

Q Now, between December 16, 1971, which is Exhibit V in evidence, and the date, or approximate date when you engaged Reynolds and Associates to be sales representatives, how much time elapsed?

MR. BOBBE: Well, the documents speak for themselves.

MR. HUGHES: I believe I'm entitled to this.

THE COURT: Well, he is entitled to an answer from the witness

A I'm sorry. I'd have to hear the question again. I wasn't following it.

(Whereupon, the last question was read by the reporter.)

A I would estimate seven months. Six or seven months.

Q I show you a letter dated August 7th, or a copy of a letter dated August 7, 1972, and ask you whether you received that letter from Mr. Gibson.

A I believe I received a letter like this, but it didn't have all the names listed on this copy.

MR. HUGHES: I ask that the paper be marked for identification.

THE COURT: Let it be so marked.

***** (Document above referred to was marked Defendant's Exhibit Y for identification only as of this date.)

Q In the interest of saving time, are you saying that the only difference between Exhibit Y for identification and the original is that the CC reference and the names were not on the original, is that what you are saying?

A May I look again?

MR. BOBBE: I'll concede that, if you wish me to, Mr. Hughes.

MR. HUGHES: I offer it in evidence.

THE WITNESS: In reading this carefully now I'm not sure I have seen this letter before at all, because it makes reference to an earlier letter, and that may be the one that

I recall receiving. I'm not a hundred per cent certain that I have seen this letter, but I know that if I had seen it, it did not have those names on it.

MR. HUGHES: May I have Exhibit 15?

BY MR. HUGHES:

Q You referred to an earlier letter from Mr. Gibson. Is this the letter to which you refer, that you identified that was marked as Exhibit 15?

A May I look at that letter at the same time to see?

This is the earlier letter that I do recall, yes.

Q You are saying you got the first one, but not the second?

A I say I don't recall if I did get the second.

Q You have no recollection of having gotten the second, is that correct?

A I know I discussed the --

MR. HUGHES: I object to that, your Honor.

A Well, I'm trying to help myself recollect.

Q Well, don't recollect out loud, please.

A I just don't recall. I may have received this letter.

THE COURT: Which one?

THE WITNESS: The second one, your Honor.

Q Well, is it your testimony that you don't know whether you got it, is that what you are saying?

A That's what I am saying, I don't recall.

MR. HUGHES: Well, your Honor, I'll withhold the offer of this for the time being.

THE COURT: It's still for identification then.

Q I show you a letter dated August 20, 1968, from Mr. Howell of Twin Disc, to LEM Instrument Corporation, and ask whether you received that letter.

A I believe I did, yes.

THE COURT: From whom was that again?

MR. HUGHES: From Mr. Howell of Twin Disc.

I offer it in evidence.

THE COURT: Howell, did you say?

MR. BOBBE: Howell, H - o - w - e - l - l.

THE COURT: There are two Howells?

MR. BOBBE: R. T. Howell is the director of LEM.

THE COURT: Oh, this witness's name is Lowell, not Howell. All right.

MR. BOBBE: I don't see the relevancy of this letter at all, and I object on those grounds.

MR. HUGHES: Well, your Honor, he is talking about insurance benefits, and there was a lot of testimony on that subject before. It's directed to that subject.

THE COURT: Overruled.

***** (Document above referred to dated 8/20/68 was marked Defendant's Exhibit Z in evidence as of this date.)

MR. HUGHES: I would like to read this to the jury if I may, your Honor.

THE COURT: Yes.

(Whereupon, Defendant's Exhibit Z was read to the jury.)

MR. HUGHES: Now, Mr. Bobbe, in the interests of saving time, I would like to

offer as one exhibit the correspondence that ensued between Mr. McGuire of the insurance company and Mr. Lowell.

MR. BOBBE: I have no objection.

*****

(Documents above referred to were thereupon marked Defendant's Exhibit AA in evidence as of this date.)

MR. HUGHES: Your Honor, this exhibit consists of nine sheets, each a separate communication, marked as a single exhibit, and as I say, represents the correspondence between the insurance company and Mr. Lowell.

THE COURT: All right.

MR. HUGHES: Part of Exhibit AA in evidence is a letter from Mr. Lowell to Mr. Richard P. McGuire, Massachusetts Mutual Life Insurance Company, dated June 18, 1969, and it reads:

"Dear Dick: We have carefully reviewed our benefits program here at LEM, and I am sorry to inform you that we have decided not to proceed with life insurance coverage

at this time. Your efforts are greatly appreciated and hopefully we will be contacting you in the near future to ask you to proceed."

BY MR. HUGHES:

Q Mr. Lowell, I show you a paper and ask you if this is the form letter that you wrote to various organizations following your discharge from LEM Instrument Corporation.

A This is a form letter that I have used in seeking employment, yes.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: No objection.

*****

(Document above referred to was thereupon marked Defendant's Exhibit BB in evidence as of this date.)

THE COURT: Let me see that a moment, please?

From whom was this received?

MR. HUGHES: Your Honor, this has been identified as a form letter which Mr. Lowell says he sent to various people in connection with his obtaining employment following his discharge.

THE COURT: All right.

BY MR. HUGHES:

Q Mr. Lowell, I show you twelve sheets consisting of what appear to be advertisements and ask whether they are copies of advertisements to which you responded subsequent to October 11, 1972.

A These are advertisements that I answered, yes.

MR. HUGHES: I offer them as one exhibit, and I ask that they be stapled together.

MR. BOBBE: No objection.

THE COURT: All right.

***** (Documents above referred to were marked Defendant's Exhibit CC in evidence as of this date.)

THE COURT: You say you responded to these ads after you were discharged?

THE WITNESS: In my efforts to find employment, yes.

Q Mr. Lowell, I show you a paper headed Inter-Office Communication, dated May 12, 1970, Twin Disc Corporation, and ask you whether you received a copy of that document.

A Not addressed to me, but I believe I have seen a copy of it.

Q As a matter of fact, it came out of your files, did it not?

A Well, I don't know if this was a copy -- yes, it must have come out of my files, I see from my identification. I received a so-called blind copy of this from Mr. Gibson. As I say, it's not addressed to me, but I have seen it.

Q You received it?

A Yes, or he gave it to me.

MR. HUGHES: I offer it in evidence.

MR. BOBBE: No objection.

***** (Document above referred to was marked Defendant's Exhibit DD in evidence as of this date.)

MR.HUGHES: I would like to read just a short extract from this, which says, "I am meeting with Frank Lowell tomorrow and Thursday. In the meantime, Frank has provided the following general estimate: Additional funding next twelve months to break-even point, $200,000."

Your Honor, I have no further cross examination.

MR. BOBBE: May I have five minutes,

your Honor?

THE COURT: Yes. Don't discuss the facts of the case, members of the jury. Keep an open mind on all the evidence. Form no opinion regarding it at this time.

We will take a short recess and send for you in a while.

(Whereupon, a recess was declared.)

(After the recess the jury returned to the Courtroom and the following occurred:)

THE CLERK: Mr. Lowell, you are still under oath, sir.

THE WITNESS: Yes.

REDIRECT EXAMINATION

BY MR. BOBBE:

Q Mr. Lowell, you were asked on cross examination as to the discharge of Mr. Samuel, and you testified that he was discharged but that he came back and was there for about a month and then resigned of his own accord. Now, did you have a conversation with him at that time as to why he would not continue with you in your employment?

A Yes, I did.

Q What was that conversation?

A He told Bob Everett and me both in that conversation that he had made arrangements to go in to his own business, and that was why he was leaving.

Q Did he say that he was going in with somebody else?

A Yes, he told us that he was planning to go into business with his brother and with some other individual.

Q Did he later make a claim for unemployment insurance?

A Yes, he did.

Q Claiming that he was discharged on the second occasion, is that it?

A Yes.

Q What happened to that claim?

A Well, that claim resulted in a hearing and then an appeal, and in both the hearing and appeal, Mr. Samuel was denied unemployment insurance.

Q I show you this paper and ask you if you received a copy of it.

A Yes, this is a copy of what was received at LEM Instrument.

Q And that is the decision of the examiner rejecting the claim on the hearing, is that correct?

A The referee, yes.

MR. BOBBE: I offer that in evidence.

MR. HUGHES: May I see it, please?

No objection.

*****

(Document referred to was marked Plaintiff's Exhibit 23 in evidence as of this date.)

BY MR. BOBBE:

Q Now, you were asked about whether you did not go on vacation and leave the business alone on August the 11th. Did you in any way communicate with the office other than your physical presence there after August 11th?

A Yes, I telephoned the office quite regularly during the following two weeks.

Q Did you call them on Monday, August 14th?

A The first thing in the morning I did, yes.

Q Who answered the phone?

A Mr. Everett.

Q Who else did you speak to?

A I spoke with Mr. Scaar.

Q Had you spoken to Mr. Scaar before you left on August 11th?

A Yes, I spoke to Mr. Scaar and to Mr. Gay both, giving them instructions on the work that was to be done the

following week or two.

Q There was offered in evidence a report, monthly report of August 11, 1972, which was the date that you discharged Everett. You testified that you know it was sent on the same day. Do you know whether it was sent before or after you discharged Mr. Everett?

A It was sent before that incident occurred.

Q You were asked about a lapse of time between the first letter that you received from Ray Lawson Associates, the sales representatives, November 17, 1970 and August 18, 1972. Were you in communication with Lawson Associates between those two dates?

A Oh, yes. We had several meetings and telephone conversations and exchange of correspondence.

Q Was there any reason why you did not enter into a contract with them?

MR. HUGHES: I object to that.

THE COURT: Sustained as to form.

Q Did you give careful consideration to the question as to whether or not to employ Ray Lawson as of November 17, 1970?

A Yes, I did. I considered it very carefully.

Q Did you communicate that fact to anyone?

A To Mr. Lawson.

Q What did you tell him?

A I told him that after --

MR. HUGHES: I object unless a time and place are fixed.

THE COURT: Yes, that's right.

Q Subsequent to his letter of November 17, 1970, did you get in touch with him?

A Yes.

Q What did you tell him?

MR. HUGHES: Well now, I press the objection unless the place or the circumstances are fixed.

Q Was he present at your place?

A Well, he did visit our place, and then I had telephone conversations with him subsequent to that date, and it was, I believe, during a telephone conversation, perhaps a month and a half or a month after that first series of contacts, that I told him that I didn't feel he could accept our line without the possibility of a conflict of interest with another line he was then representing.

Q When you heard from him again in August of 1972, did you discuss the question with him then as to any

conflict of interest?

A Yes, I did, and by that point in time there did not appear to be a conflict of interest.

Q Did you then promptly thereafter enter into a contract with him?

MR. HUGHES: Your Honor, I object to the form of that question.

Q Well, did you in the month of August or September enter into a contract with Ray Lawson Associates for them to represent you as a sales representative?

A Yes, I did.

Q Also, you were asked about a lapse of time in connection with the correspondence with Reynolds Associates, from December 16, 1971 to May 19, 1972. Were you in contact with Reynolds between those two dates?

A Oh, yes. Both written and telephone contact.

Q Do you recall any of the telephone conversations that you had?

A Well, one of the telephone conversations dealt with --

MR. HUGHES: I object unless again the time is fixed.

THE COURT: Fix the time.

Q As closely as you can, how much subsequent to December 16, 1971, the date of Defendant's Exhibit V, was this?

A I would say within a couple or three weeks. It was probably after the 1st of the year that I contacted Mr. Reynolds by telephone and discussed with him the lines that his company was then representing, and shortly after that telephone conversation, at his request, I sent many sets of our product literature for his review, and then I called back during late January and perhaps February. Each time Mr. Reynolds was not in the office, but I left messages for him. Then he returned my call, and we had some additional conversation about LEM's products. Then subsequently, he wrote me or telephoned me, I believe, telling me that he couldn't locate the literature I had sent him, and asked me if I would send him some literature.

Q And did you send it to him?

A And I did send him some additional literature.

Q Did you continue negotiations with him until --

A Yes, we did. I checked some of the references he provided. He checked the possibility of selling our products to some of the companys his people regularly called on, and he finally indicated that he thought he could sell our line successfully, and I thought so too, and so we signed an

agreement.

MR. BOBBE: I offer in evidence a letter from Mr. Gibson to Mr. John H. Batten and Mr. R. T. Howell, and Mr. D. E. Beaton, dated May 20, 1970.

THE COURT: What was the date?

MR. BOBBE: May 20, 1970.

THE COURT: A letter from Gibson to whom?

MR. BOBBE: To Messrs. Batten, Howell and Beaton.

MR. HUGHES: No objection.

*****

(Letter above referred to was marked Plaintiff's Exhibit 24 in evidence as of this date.)

MR. BOBBE: May I read it, your Honor?

THE COURT: Yes.

(Mr. Bobbe thereupon read Plaintiff's Exhibit 24 in evidence to the jury.)

MR. BOBBE: Now I offer in evidence a letter from John H. Batten to Mr. Frank Lowell, dated June 18, 1970.

MR. HUGHES: No objection.

*****

(Letter above referred to was marked Plaintiff's Exhibit 25 in evidence as of this date.)

MR. BOBBE: May I, your Honor?

THE COURT: Yes.

(Whereupon, Mr. Bobbe read Plaintiff's Exhibit 25 in evidence to the jury.)

THE COURT: Now, that was dated June 18, 1970?

MR. BOBBE: Yes.

I offer in evidence an inter-office communication from Twin Disc to Mr. John H. Batten, with copies to R. T. Howell, D. B. Beaton and blind copies to Frank Lowell and one Gordon Danhof.

MR. HUGHES: No objection, your Honor.

THE COURT: Let it be marked.

*****

(Document above referred to was marked Plaintiff's Exhibit 26 in evidence as of this date.)

MR. BOBBE: I would like to read this to the jury if I may, your Honor.

THE COURT: Yes.

(Whereupon, Mr. Bobbe read Plaintiff's Exhibit 26 in evidence to the jury.)

THE COURT: And the date of that again, please?

MR. BOBBE: November 4, 1970.

BY MR. BOBBE:

Q When you had this stockholder purchase agreement, was there a provision for an escrow of stock that was to be delivered to you contained in that agreement?

MR. BOBBE: I believe it can be conceded there is such a provision in the agreement in evidence.

MR. HUGHES: Your Honor, I am prepared to make a concession that the contract, which really speaks for itself, has something to say on the subject, but I submit that this whole subject is improper redirect.

THE COURT: Is there a claim here for that? There is no claim here for that, is there?

MR. BOBBE: May we approach the bench?

THE COURT: Come up.

(Discussion at the bench between Court

and counsel, not within the hearing of the reporter.)

BY MR. BOBBE:

Q At the time that you received the letter of October 9, 1972, discharging you and Mr. Everett, was there any conversation with Mr. Gibson as to what he had said prior to meeting with you to any other officer or director of LEM Instrument Corporation?

A Yes.

MR. HUGHES: Excuse me, but would you repeat that question?

(Whereupon, the reporter read the last question as requested.)

A The answer is yes.

Q What was that conversation?

A Well, he told me that he was very unhappy about the closing down of LEM, that he had great confidence in the future of LEM and that he had offered to Mr. Batten a proposal that he, Mr. Gibson, would come out of retirement and come east and work with me until we could get LEM further along in sales and profits, and that Mr. Batten had declined that offer.

Q In addition to the form letter that you sent in answer to advertisements, did you make any further efforts

to find employment, other employment, since your discharge?

A Oh, yes.

Q What did that consist of?

A Well, first I registered with the New York State Unemployment Service, and reported to them regularly every week for six months until my benefits ran out. I sent unsolicited letters to companies from a list that I compiled myself, a list of possible employers. I sent unsolicited letters to a listing of employment recruiters, management consultants who specialize in recruiting employees. I ran advertisements at my own expense in newspapers offering my services, and I contacted people I know directly personally seeking employment opportunities. Also, I answered many advertisements in addition to the ones that were shown to me earlier today, subsequent to the time that those were presented to you, Mr. Hughes.

Q Did you receive any offers of employment of any kind?

A No, sir.

Q When you registered with the New York State Unemployment Bureau, did they register you for other employment?

A Oh, yes. They -- in addition to requiring me

to report to the local office, they required me to report to an office specializing in the placement of people like myself, and at no time were they able to find a suitable opportunity for me.

Q How old are you today, Mr. Lowell?

A I was forty-nine this past April, last year, so I will be fifty this coming year, sir.

MR. BOBBE: That's all.

RECROSS EXAMINATION

BY MR. HUGHES:

Q Mr. Lowell, I show you a letter on the letterhead of Twin Disc Inc., and ask you whether you received that letter.

A Yes, I believe I did receive that letter.

THE COURT: Dated when?

MR. HUGHES: I offer it in evidence. It is dated May 27, 1970.

MR. BOBBE: No objection.

***** (Letter dated May 27, 1970 was marked Defendant's Exhibit EE in evidence as of this date.)

MR. HUGHES: Your Honor, I would like to read this to the jury.

THE COURT: All right.

(Whereupon, Mr. Hughes read Defendant's Exhibit EE in evidence to the jury.)

BY MR. HUGHES:

Q Do I understand, Mr. Lowell, that since October 9, 1972, you haven't done a lick of work?

A I have had no paid employment.

MR. HUGHES: That's all.

MR. BOBBE: One other question, your Honor.

Have you got a list of the sales --

MR. HUGHES: The what?

MR. BOBBE: The accountant's list?

MR. HUGHES: The list that we prepared?

MR. KHEEL: It's in evidence.

MR. HUGHES: Yes. What is the Exhibit number of that?

MR. BOBBE: All right, Exhibit S.

FURTHER REDIRECT EXAMINATION

BY MR. BOBBE:

Q I show you Exhibit S, a list of sales, and ask you if it shows no sales in the month of April, 1969 or in the month of July, 1969 to November, 1969 inclusive. What was

the nature of your activities during those months, if you recall?

A From April, 1969 or thereabouts through to 1970, July, 1970, the activities of all the people at LEM were mainly devoted to the development of the shaft encoders and digital displays.

Q Also on that sheet it appears that no sales were reported for the month of September, 1970.

A '70?

Q '72. Do you have any recollection as to whether or not sales were made during that month?

A There were some sales. I don't recall the dollar amounts.

MR. BOBBE: That's all.

MR. HUGHES: What month was that?

MR. BOBBE: September, 1972.

FURTHER RECROSS EXAMINATION

BY MR. HUGHES:

Q Mr. Lowell, you have now told us that during the months of 1969 when there were no sales, that you were busy developing the shaft encoder. Is that what you testified to?

A There were no substantial sales.

Q I know, but you said you were busy developing an encoder?

A Busy developing a shaft encoder, yes.

Q But hadn't you already told us, not once but many times, that you had prepared and worked on this shaft encoder even before Twin Disc took over this enterprise?

A No, I never said that because that's incorrect.

Q Was there anything in your literature prior to the takeover which indicated that you had a shaft encoder?

A Yes, but it was quite different.

Q Just a minute. Was there or wasn't there?

A Yes.

Q All right. And it was in an exhibit annexed to your employment contract, wasn't it?

A What was in that exhibit?

Q This literature that I am referring to, either annexed to that or to the acquisition agreement, right?

A Yes, but the shaft encoders that were mentioned were quite different.

MR. HUGHES: I move to strike it out.

THE COURT: Strike it out. Wait for a question before you make any statement.

Q You have already identified this as literature

that you sent out before the acquisition, is that correct? (Indicating brochure).

THE COURT: That's the brochure attached to the exhibit?

MR. HUGHES: That's the brochure attached to the exhibit, yes, sir.

Q You say in here, do you not, of that exhibit, "While this catalog describes what are considered extensive lines of electromagnetic clutches and brakes, and electrically controlled multi-speed units produced, it by no means fully describes the related products and skills which are available from LEM Instrument Corporation." Then over on the next page there is more of a description, and I ask you is this the literature that you sent out, and is this the exhibit that was physically attached to that acquisition agreement, Exhibit 1?

A That is correct.

MR. HUGHES: That's all.

FURTHER REDIRECT EXAMINATION

BY MR. BOBBE:

Q Mr. Lowell, was there any difference between the shaft encoders that you had in mind in that literature and the shaft encoder that you subsequently developed?

MR. HUGHES: I object to that as incompetent, irrelevant and immaterial.

THE COURT: No, I think it is. Overruled.

A Yes, there was a dramatic difference, complete difference.

Q What was the difference?

A The shaft encoders that I said we were developing from July, 1969 until roughly July of 1970 were shaft encoders based on the invention of Mr. Samuel, which didn't exist at the time that that blue catalog was prepared. The encoders that we referred to in that blue catalog were encoders of a very conventional nature, and I had specific reference to the encoders that LEM had manufactured for a space program and for which we had received one or two follow-on orders.

Q And the encoder that was being developed under Mr. Samuel's invention, how did that differ?

A Well, it was completely different in approach. It was a more economical, a much more flexible, a much more reliable and in general, a much superior type of encoder.

MR. BOBBE: That's all.

MR. HUGHES: One more, your Honor?

FURTHER RECROSS EXAMINATION

BY MR. HUGHES:

Q Mr. Samuel was a very competent, able man, was he not?

A Yes, I think he was.

Q Yes, and you fired him, didn't you?

A No, he resigned.

Q Do we have to go through all that again? You fired him, didn't you?

A And then he resigned.

Q You fired him and Everett got him back, is that right?

A That is not right.

THE COURT: You said before that you fired him and then he came back after Everett talked to you.

THE WITNESS: And to me.

THE COURT: Yes, that's what I say.

THE WITNESS: Well, that isn't what Mr. Hughes said, your Honor. I'm sorry.

BY MR. BOBBE:

Q Did you fire him for any cause?

A Yes, I had sufficient cause.

THE COURT: Let's not go all over that again. This has already been testified to.

MR. BOBBE: All right, your Honor. That's all.

THE COURT: Step down.

(Whereupon, the witness was excused by the Court.)

THE COURT: We are going to recess now until tomorrow morning.

Members of the jury, don't discuss the case among yourselves or with anyone else. Keep an open mind on all the evidence. Form no opinion in the case at this time.

(Whereupon, the jury was excused, and the following occurred in the absence of the jury:)

MR. HUGHES: Your Honor, do I understand that the Plaintiff has rested?

MR. BOBBE: Yes, Plaintiff rests.

THE COURT: Well, I didn't understand that. I thought you were just through with this witness.

MR. BOBBE: Yes, your Honor, I will rest.

MR. HUGHES: Your Honor, the hour is late. I want to make a motion to dismiss, and with your Honor's permission, I would like to submit to your Honor a memorandum, with a copy to Mr. Bobbe, in support of an oral motion to dismiss which I would like to make at the opening of Court tomorrow morning.

THE COURT: Very well.

MR. HUGHES: And may I call your Honor's attention to the fact that we are staying here in the area, and we have made a change to page 4, and I didn't have the benefit of stenographic services. So, we did the best we could by putting the text in in what I hope is legible writing.

THE COURT: All right. I will consider the memorandum of law and reserve decision on a motion which you now make to dismiss the complaint.

MR. HUGHES: Yes, I now make it on the usual grounds, for failure to state a prima

facie case, your Honor, and I would like --

THE COURT: -- to elaborate on that in the morning.

MR. HUGHES: Yes, and I would like your Honor to consider the memorandum.

THE COURT: Very well.

(Whereupon, the trial was adjourned to October 11, 1973.)

- - - - -

October 11, 1973
Riverhead, New York

(The trial continued.)

(Appearances as heretofore noted.)

(The following occurred in the absence of the jury.)

THE CLERK: Case on trial, Lowell versus LEM Instrument Corp.

THE COURT: Mr. Hughes?

MR. HUGHES: Yes, sir. Your Honor, may I make a motion here, or would you prefer that I use the lectern?

THE COURT: No, you can make it right there.

MR. HUGHES: At the close of the

session yesterday afternoon, I moved to dismiss upon the ground that the Plaintiff had failed to make a prima facie case, and without getting into an extended discussion, I felt that I wanted to briefly outline my reasons.

THE COURT: I reserved decision on that motion yesterday.--

MR. HUGHES: Yes.

THE COURT: (Continuing) -- so that you could expand on the reasons.

MR. HUGHES: Yes, and I felt that this was not just the routine motion at the end of a Plaintiff's case. I start with the proposition, your Honor, that the Defendant was obliged to prove the performance of conditions precedent, and I do want to stress that in this case it seems plain to me for two reasons that there were conditions precedent.

I have here, your Honor, the employment contract, and paragraph 1 contains what is to me language which is dispositive on this point. It says that Lowell is herewith employed for a term, seven years.

Now, that's a long term. Then it goes on to say, "As long as he shall faithfully and diligently perform the duties of his employment."

Now, the words "As long as" are in the equivalent of it. They mean the same thing. So that here was a contract which said "You work for us for seven years if you faithfully and diligently perform the duties of your employment."

I also stress that the language is very broad, and I consider that to be a further manifestation of the necessity for the Plaintiff to have performed before we were required to perform on our part, namely to pay him his compensation, and it was made broad obviously, purposely, because if you are going to have a man employed for seven years, and you commit yourself to pay him the kind of money that he was going to be paid, and get the kind of benefits that he was going to get, you want it to be absolutely sure that you had a provision in that contract which required him to do a

job. I don't see how paragraph 1 could have been made any plainer than that. So I submit that on its face the agreement shows that there were conditions precedent.

In addition to that, we annexed to our memorandum in support of the motion a copy of Mr. Justice Berman's decision in which he says, "However, when a party is employed by a corporation as its general manager and president, it certainly may be inferred that the 'conditions' of such employment include dealing with its employees and customers harmoniously and in the best interests of the company and providing proper leadership for the company."

In the opinion of the Court, the Defendant sufficiently pleaded Plaintiff's alleged failure to perform these conditions.

So, the posture of the case as it came on for trial was that there was a determination that there were conditions precedent, and that became the law of the case, and it was obviously sound law for the reasons that I have elaborated on in discussing paragraph 1.

That puts us in this posture: We had to plead the nonperformance of the conditions precedent because of old rule 92. But, having pleaded it, which really, your Honor, is nothing more than sort of a bill of particulars, you have to tell the Plaintiff in what respect you say he didn't perform. So, he is sufficiently informed to go ahead and prove his case. We had to plead nonperformance, but he had to prove performance once we had pleaded, and that we say is what all of the cases say, and that's all they say, and they stress the fact that this is particularly true in the case of the service contract.

I'm not going to take the time necessary to read the cases. We have cited them in our brief, but the law is very plain.

I submit, your Honor, that there has been a failure to prove those conditions precedent. The only proof that was adduced was in sending out fliers to thousands of people, which anybody can do. You can sit in a room and send out a lot of pieces of

paper.

As to the hiring of a few registered representatives now and again, at the end of the contract we find there were only two of them, and that's really about it. But, during the course of the trial up to this point, we, although we didn't have to do it, have adduced proof that shows the failure to perform in a satisfactory manner.

From the time we got tangled up in this, your Honor, it has been a loosing venture, and this man didn't run the company, but he ran it into the ground.

I'm not going to offer the facts and situations except to say that the loss was staggering. We poured money in there, and all we got for our trouble were these catastrophic losses.

I also want to stress the fact that the Plaintiff himself recognizes that there can be a discharge when a man doesn't perform under the terms of this very agreement, because the agreement with Mr. Everett was an identical

form of agreement, and he wrote a letter in which he said, "This action is being taken as a result of your continuing failure to perform your duties in a satisfactory manner."

I am not saying that Mr. Everett performed them in an unsatisfactory manner. I'm saying that this is what this Plaintiff wrote, and he says, "To continue your employment would seriously jeopardize the success of this corporation, and at present, I am exercising my authority to dismiss you." He said on the witness stand that there was no doubt in his mind that Everett could be dismissed for unsatisfactory performance.

We submit that he failed to show performance, and we submit that we have shown non-performance in the sense that he either did nothing, or the things that he did were utter mismanagement. His handling of the employees by his own admission, and by the proof that has come out thusfar, shows that this man either lacked the capacity to manage, or having it, failed to exercise.

THE COURT: Well, you must be arguing that this is solely a matter of law, but much of what you say I suggest is a matter that you address to the jury on the facts. In other words, you are saying as a matter of law there is no proof here at all that this man did anything in support of the provisions of the contract which required him to faithfully and diligently perform, and to use his best efforts.

MR.HUGHES: Yes, but I am saying two things: I am saying that on the evidence, the so-called evidence that he adduced, it is so insubstantial as to not amount to any evidence at all, and I'm saying on top of that, through cross examination and documentary proof, we have established that he didn't perform in a satisfactory way.

THE COURT: As a matter of law.

MR. HUGHES: Yes, I'm saying that as a matter of law.

I recognize that if your Honor should be against me on that, I'll probably be saying

the same thing to a jury, but I think that it's more than that. I think we have adduced sufficient evidence to show that there was non-performance of the conditions precedent.

THE COURT: What do you say, counsel?

MR. BOBBE: Your Honor, first off, I would like to address myself to Justice Berman's decision. He specifically said that certain of the Plaintiff's alleged failures did not involve conditions precedent. "However, when a party is employed by a corporation as its general manager and president, it certainly may be inferred that the 'conditions' of such employment included dealing with its employees and customers harmoniously and in the best interests of the company and providing proper leadership for the company."

Now, he specifically ruled out any of the other conditions precedent except those three which are the last three in their answer.

They had to plead which conditions precedent were not performed, and they cannot go on the broad assumption that we have to prove

all of the assumed -- or implied conditions precedent, but only those that they have specifically pleaded in their answer, so that the question of faithful and loyal employment, performance of the duties, is too broad to permit them to raise the question as to whether or not we have presented a prima facie case, assuming that Judge Berman decided that these conditions are to be inferred.

THE COURT: He says "May."

MR. BOBBE: May be inferred.

THE COURT: And that was on a motion to strike certain defenses.

MR. BOBBE: That's right. But now we have proved prima facie at least the performance of those three conditions precedent.

This memorandum that was prepared by Mr. Hughes was prepared before he heard any of the testimony, because he brought it here from New York. So, he assumed we were not going to prove the performance of those conditions precedent, assuming that we had to prove them, and consequently the motion is

really moot because the proof is now here before the Court. So, I think that clearly we have made a prima facie case and we have proved those conditions precedent.

THE COURT: Yes, I think so, and, of course, there is an issue of a question of fact as to whether the Plaintiff performed all of those conditions precedent. But, I can't as a matter of law on the posture of the evidence in this case thus far hold it as a matter of law that no issue has been raised, or rather that there is no evidence in the case at all to support Plaintiff's contention that he performed those conditions faithfully and diligently. There is considerable evidence as to what he did while he was president and manager.

It's true that on cross examination the Defendant questioned that, but I submit that that raises questions of fact, and as such I must deny the motion of the Defendant to dismiss on the grounds that the Plaintiff has not made out a prima facie case on his part,

with an exception to you, Mr. Hughes.

MR. HUGHES: Yes, sir.

THE COURT: Bring the jury down, please.

I assume that the case will take the rest of the day?

MR. HUGHES: Your Honor, I'm sure that it will.

THE COURT: All right.

(Whereupon, the jury entered the Courtroom and the following occurred:)

(Roll call of jury.)

THE COURT: Good morning.

You may proceed with the defense, Mr. Hughes.

MR. HUGHES: Your Honor, I call Mr. Robert Everett.

ROBERT A. EVERETT, of P. O. Box 144, Ramblewood Park, Wading River, New York, called to testify on behalf of the Defendant, and being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUGHES:

Q Mr. Everett, you were subpoenaed by the Defendant to come here and testify in this action, is that correct?

A Yes, I was.

Q Are you the Robert Everett who joined with Frank Lowell and Joseph Meely to form the LEM Instrument Corporation, the Defendant in this action, in 1965?

A Yes, I am.

Q Are you presently employed?

A Yes, I am.

Q Just briefly, in a general way, would you tell us the nature of that employment?

A I'm self-employed in a partnership, Supreme Instrument Company, and we are a machine shop manufacturing general machining.

Q There came a time when Twin Disc Corporation took over LEM Instrument Corporation, is that correct?

A That's correct.

Q That was in what year?

A July of '68, I believe.

Q In that connection, you exchanged shares of stock in LEM for shares of stock in Twin Disc Corporation, is that correct?

A That's correct.

Q At the time, did you also enter into a written employment agreement with LEM?

A Yes, I did.

Q I show you Exhibit K and ask you if that's the contract that you entered into.

A Yes, this appears to be the contract. Yes.

Q After Twin Disc took over, what offices did you hold with them?

A I was vice president and I was secretary on the Board of Directors.

Q And you were also a member of the Board of Directors you say?

A That's right. Secretary.

Q Were you a member of the Board as well?

A Yes.

Q During the years 1968 through 1972, did LEM have an operating profit?

A Not to my knowledge, no.

Q Can you tell us briefly and in a general way what your actual duties were, your day-to-day duties at LEM?

A I was head of manufacturing and responsible for the manufacture of parts. I also did the assembly of

units myself and instructed others how to do it. I purchased parts. I assisted engineering and drawings, making layouts and all detailed prints of engineering parts.

I also maintained the inventory and the general duties around the factory and shop.

There are probably more things, but at the moment that's what I can think of in general that I did.

Q You say that you built the units. What units are you referring to when you use that term?

A Well, we manufactured clutches and brakes and shaft encoders, and I did the assembly of those units.

Q That is, you personally did the --

A Yes, the work of putting these units together.

Q So that they would be ready for sale and delivery, is that correct?

A That's correct.

Q Did you have anybody working under you?

A Yes, I had Mr. Bill Gay who was a machine shop foreman who manufactured the parts that were required in these units, the mechanical parts, that is.

Q How long was he with the company?

A Oh, approximately four years.

Q Was he with the company at the time of the

takeover by Twin Disc?

A I think just prior to it or just after. I'm not exactly sure of the date.

THE COURT: Just prior to it he was with the company or not?

THE WITNESS: I really can't state whether it was just before the acquisition or just after.

THE COURT: I see.

Q And he remained with the company up until the time that it ceased operations, is that correct?

A That's correct.

Q He was under your supervision, you say?

A That's correct.

Q What was the nature of his work?

A Machine shop fabrication of parts, and at times, I was trying to break him in to assembly with me, to aid me in assembly.

Q Was there wiring involved in the putting together of these units?

A Yes.

Q That is electric wiring?

A That's correct.

Q Who did that work?

A Well, I did a good portion of it. There were areas that required microscope work,and I did much of the wiring that was required under the microscope, and the finishing of the unit. It was brought up to a point that required perhaps, oh, twenty-five per cent more wiring, and that was done by whoever was in the engineering department at the time, employed as an electronic engineer.

Q During this time, was a Mr. Samuel employed by the company?

A Yes, he was.

Q Do you recall, and I don't want to pin you down to the exact time, but the approximate periods during which he was employed?

A Yes. He was employed for about a little over two years, up until,I did write down some dates that I have. I believe it was up until June of '71.

Q Was that the time when Mr. Lowell discharged him?

A That's correct.

Q What was the nature of Mr. Samuel's duties?

A Well, Joe Samuel developed, invented and developed the encoder, the shaft encoder. He did the

electronic engineering and also some of the mechanical development of the unit, and to the best of my knowledge, he was responsible for the shaft encoder that LEM presently has.

Q Did you and he get along well together?

A Oh, yes. We are friends.

Q You were friends then, and you are friends now?

A Oh, yes.

Q Do you ever recall during the course of employment teasing Mr. Samuel?

A Absolutely. I teased him, and I still tease him because we are friends.

Q Did you ever say to Mr. Samuel with regard to Mr. Lowell, "Here comes your white-man boss"?

A I never made that statement in my life.

Q Can you tell us a little bit about the layout of the plant, the LEM plant? Was this a big place, a small place or what?

A No, it was about 2,200 square feet, and it was partitioned off into separate areas: An office for Frank Lowell, a general office that was occupied by myself, and room for another desk, an area that was walled off for engineering, where we did the design work and layout work, a separate room for assembly of parts, a separate room for

the storage of inventory of parts, and inspection, and then a large open area where the machinery and manufacturing was done.

Q Mr. Lowell had his office, and then you had an area where you worked. Was that close by his office?

A Well, the office where I worked was right outside his. We had connecting doors, and the assembly area was right next to that.

Q During the course of an ordinary day, where would Mr. Samuel be doing his work?

A Generally he would either be in the engineering design area, or he would be in the assembly area putting units together, depending on what he was doing at the time.

Q Was he within earshot of people who were conversing either in Mr. Lowell's office or in the place where you worked?

A Yes.

Q Now, do you recall a time, and the circumstances under which Mr. Lowell discharged Mr. Samuel?

MR. BOBBE: Your Honor, I must object to that. You wouldn't permit me on direct examination to go into that, and I think it's irrelevant because in the first place it's

too remote, and in the second place, we are not trying the case as to whether or not it was proper to dismiss Mr. Samuel.

THE COURT: I think it has a bearing on whether Mr. Lowell used his best efforts in properly managing the operation of this company and on the issue of whether he failed to create and maintain a harmonious relationship among the employees. I think it has a bearing on that, so I'll overrule your objection.

A May I hear the question again, sir?

(Whereupon, the last question was read by the reporter.)

A Yes.

Q Will you tell his Honor and the members of the jury those circumstances as you now recall them?

THE COURT: You were there, were you not?

THE WITNESS: Yes, I was.

MR. HOBBE: May we have the date?

THE WITNESS: Pardon me?

THE COURT: What date?

THE WITNESS: I really don't know the date.

Q Can you give us the approximate date?

A It was in the month of June of '71, as I remember. To the best of my knowledge, I was in the office with Frank Lowell, in Frank Lowell's office, and Joe Samuel was in the assembly area working at a bench, and Frank saw fit to raise his voice concerning Joe Samuel, and made some derogatory remarks about Joe. And, we then went out, Frank Lowell and myself, to the area where Joe Samuel was working, and we went into there to see what had to be done, what was in the process of being done and what had to be done to get the units out, and there was an exchange of words between Lowell and Joe Samuel because I'm sure that Samuel had heard Frank's snide remarks in his office.

MR. BOBBE: Your Honor, I must object to that.

THE COURT: Sustained. Strike that portion of the answer out.

MR. BOBBE: And also where he said derogatory remarks.

THE COURT: Well, I'll allow that.

Q Do you recall the substance of what those

remarks were about Mr. Samuel?

A I couldn't say verbatim what he said. I just know that they were not very nice remarks.

MR. BOBBE: I move to strike that out.

THE COURT: Yes, strike it out.

MR. BOBBE: And would your Honor tell the jury to disregard that.

THE COURT: Yes, disregard it.

Q Did he call him names?

MR. BOBBE: Well now, I object to that.

THE COURT: Overruled.

A I don't believe he did call him any names.

Q Did he speak in a loud voice?

A Yes.

Q Can you recall the substance of what you have described as derogatory remarks? I don't want the words, but what was the kind of thing that he was saying?

MR. BOBBE: I object to that as calling for a conclusion.

THE COURT: Yes, sustained. Can you tell us what words were used, the nature of the words?

THE WITNESS: Well, the exact words, your Honor, I can't quote verbatim. I can say that frequently, with myself as well as Joe Samuel --

THE COURT: No, what were the words about? What was he addressing himself to?

THE WITNESS: Belittling people, looking down on people, and that type of thing.

MR. BOBBE: Your Honor, I move to strike it out.

THE COURT: Strike it out. The jury will disregard it.

BY MR. HUGHES:

Q I want you to take your time and tell us not in words, but the substance of what it was that Mr. Lowell was saying about Mr. Samuel in this loud tone of voice.

MR. BOBBE: I object to that as calling for a conclusion.

THE COURT: Overruled.

A The nature of it was that he should be working faster. I can't use words or describe the feelings that were displayed, your Honor. That's really the substance of it.

THE COURT: Well, was he addressing

himself to Mr. Samuel about the way he worked?

THE WITNESS: Yes, he was.

THE COURT: What did he say about that?

THE WITNESS: In substance, these were parts or the things.

THE COURT: What? That he should work faster?

THE WITNESS: I don't say verbatim at this time that he said it, but the substance was that. He would say, "Are you making a career out of that job?" And things of that nature, to insinuate that he wasn't doing things fast enough for Frank, and knowing Joe, he was a hard worker, and I guess he did resent this type of thing because he did work as hard as possible, and he did do things as fast as possible, and remarks of this nature, I guess, were degrading.

BY MR. HUGHES:

Q We interrupted your narrative of these events. Will you continue on now with what transpired up to the point where he was discharged?

A Well, there was a heated exchange of words, again which I don't know verbatim what was said by each.

Q In your presence?

A In my presence, yes, and there was a point that it became obvious that something more may ~~insue.~~ ensue I thought there may have been some physical contact between Samuel and Lowell, and I stepped in between it and asked Frank to please go back to his office. He had fired Joe. He said, "You're fired, get out of here."

Joe said, "Well, I have to take my personal belongings," and Frank says, "Get out of here."

THE COURT: Frank is the Plaintiff, right?

MR. HUGHES: Frank is the Plaintiff, yes.

THE COURT: And Joe is Samuel, right?

THE WITNESS: That's correct.

MR. HUGHES: Joe is Samuel.

THE COURT: So that the jury may understand it and it will be clear to all of us.

MR. HUGHES: Yes, that's right.

A (Continuing) And I said, "Well, Frank, --" again so that some common sense could prevail -- it was

getting out of hand -- I said, "Frank, please go back to your office. I'll stay with Joe. He's entitled to take his personal belongings, and let's be a little calm about this."

So Frank says, "Well, if he don't get out of here, I'm going to call the police."

Well, again I spoke to Frank about going back to the office, and he finally did. Frank went back to the office, and Joe took his personal belongings, and I walked out the door with Joe.

Q Subsequent to this incident, did you have, at a later --

THE COURT: Excuse me just a moment, Mr. Hughes.

You say Samuel took his belongings? Then what did he do? Did he leave?

THE WITNESS: I escorted him to the door, yes.

THE COURT: All right.

Q And he left?

A Yes.

Q Thereafter, did you speak to Mr. Lowell about this incident?

A Yes, we did, immediately after.

Q What was the substance of that conversation?

A Well, I was concerned with what we were going to do about the designs that were not finished, the work that was unfinished, and I asked Frank what we were going to do about it, you know, and he said, "Well, we'll manage some way."

Q What did you say?

A I said, "Well, I don't know how we are going to replace a man like Joe because he's not just an engineer, but he's also willing to work with his hands, and it's difficult to get a man like him."

Q He was the man who had invented the encoder, is that correct?

A That's correct.

Q Did you make any suggestions as to how to handle the situation?

A At that time?

Q Yes.

A No, sir.

Q Did there come a time when you made a suggestion about that?

A Yes.

Q When was that?

A Well, when I saw that nothing was being done to get --

Q Was that a matter of a few days later?

A Oh, probably a matter of a week later, or something like that.

Q Then you had a further talk with Mr. Lowell, did you?

A Correct.

Q What was the suggestion you made at that time?

A Well, I suggested to Frank that perhaps I could talk to Joe and get him to come back to finish up the work that was, that had to be done, because there were not just units that had to be built, but there were designs that were not -- a new design that was not completely finished.

So, Frank Lowell said, "Well, I don't think you will be able to get him back, but go ahead and try."

So I said, "Okay," and I called Joe Samuel and asked him would he come back, and he first said no. I said, "Well, Joe, as a personal favor to me --"

MR. BOBBE: Your Honor, I object to any conversation now as hearsay, being outside of the presence of the Plaintiff.

THE COURT: He's talking to Samuel?

MR. BOBBE: Yes, not in the presence of the Plaintiff.

THE COURT: Overruled.

Q Would you like the stenographer to read back where you were testifying?

A Yes, would you please?

(Whereupon, the last question was read by the reporter.)

THE COURT: And as a result of your talk with Samuel, did he come back?

THE WITNESS: Yes, he did. He came back under certain stipulations. I saw to it that Frank Lowell left him alone if he came back and worked with the company, because he wanted first to do it at home rather than to do it in the shop, and I told him it was impossible to do that work at home, but he had to do it on the job in the shop.

He said, "Well, if you see that Frank leaves me alone, I'll come back and finish up the job that I started."

Q Did he come back?

A Yes, he did.

Q And did he finish up the job?

A Yes, he did.

Q Having finished the job, then what happened so far as his employment was concerned?

A Well, he -- I don't know if you want this, the substance of it, but I spoke to Frank. When I saw the work being completed, that work that week, and I spoke to Frank, I said, "Frank, Joe's going to finish up this week. If you want Joe to stay, you better talk to him because you fired him, and he's under the impression he's still fired, and he's looking, or going to go into business, or something else."

Well, Frank didn't do anything immediately, and then I believe it was Thursday of the week that Joe finally left -- that he finally came to me -- that is, Joe Samuel, and said, "Well, Bob, I finished up the work that I committed myself to do, and I'm leaving."

I walked in and told Frank about it, that Joe was finished and was going to leave, and Frank called Joe into the office, and myself, and I tried to ask Joe to stay, and Frank tried to ask to have Joe stay, and Frank said that -- I'm sorry, Joe said to Frank, "You fired me, and I have made other arrangements in the interim. I can't be without work, so I'm leaving. I've made my commitment here to Bob, and

I'm leaving."

Q And he left?

A And he left, yes.

Q How long was he there after he came back?

A Oh, between four and six weeks. I'm not sure exactly.

Q Do you recall an employee by the name of Coruzzi who worked for the company?

A Yes.

Q When was he employed?

A Approximately, oh, two months after Joe Samuel left -- yes, right after Samuel was fired that final time, after his return. I'd say about two months after.

Q Did there come a time when Mr. Lowell fired Coruzzi?

A Yes.

Q When was he fired?

A Approximately six months after his employment. Six or seven months after his employment.

Q How did you learn that he had been fired?

A Well, I did not witness what transpired, but I was in the assembly area working on some units when Ed Coruzzi walked in and he said, "Bob, I'd like to say good-by.

It was nice working with you," and I stood up and said, "What happened, Ed?"

With that, Frank Lowell walked in right behind him and he said, "Well, I have been fired."

I said, "Well, I'm sorry to hear that, Ed." And then we couldn't speak at the time as Frank was there, and he just left.

Q Did you have a discussion with Mr. Lowell about this?

A Yes, I did.

Q Tell us the substance of that discussion.

A Well, I asked Frank what happened, and Frank told me that Coruzzi was under the impression that he was going to be compensated for his going to school. He was finishing up his master's degree and that Coruzzi was under the impression that LEM was going to pick up the tab, and he wanted a raise after six months. But he said, "You know I don't promise things like that."

Well, that night I was also talking to Ed Coruzzi and he told me basically the same thing that Frank did except that he told me that Frank on his hiring him promised him --

MR. BOBBE: Your Honor, I must object

to this.

THE COURT: Sustained.

Q That's the sum total of your knowledge on that subject, is that right? His Honor has excluded the conversation with Mr. Coruzzi.

Have you told us everything that you have personal knowledge of with regard to that incident?

A Personal knowledge, yes.

Q Did there come a time when Mr. Everett discharged you?

A You mean Mr. Lowell?

Q Mr. Lowell discharged you, yes.

A Yes, Mr. Lowell discharged me verbally twice and in writing once.

Q Well, you say verbally twice. The final discharge was the written discharge, is that correct?

A That's correct.

Q Now, when did he discharge you verbally the first time?

A Probably in the period four or five weeks prior to the written discharge. We had several arguments, and he told me to get out of there, get out of the building, "You're fired," at which time I told Frank, "You can't fire me, Frank.

I have an employment contract, and only the Board of Directors has a right to do that. If you want to fire me, you had better contact the Board of Directors."

Q What about the second episode?

A The same type of thing exactly.

Q Then did there come a time when he wrote out a letter discharging you, is that correct, the third time?

A Yes.

Q You and he had been business partners, so to speak, for a number of years, is that correct?

A Yes, that's correct.

Q Over the years, had your relationships been friendly and cordial?

A I would say they were up until, oh, about three or four months prior to the Samuel incident.

Q Then what were your relations during that three or four-month period prior to the Samuel incident?

A I would say they were strained.

Q Did you and he have disagreements during that period?

A Well, yes. Nothing of any major -- no major disagreement, but just strained relations compared to the friendship that existed prior to it.

Q Did he call you names during that period?

A I don't know whether it was prior -- no, it was after, after the Samuel incident that things became more heated and Frank -- again I have to say, your Honor, derogatory remarks were made to me by Frank.

MR. BOBBE: I move to strike it out, your Honor.

THE COURT: Yes, strike it out. Give us the words in substance, and if you can't, just say you can't.

THE WITNESS: Well, I know exactly one of the expressions that he called me.

THE COURT: Right.

THE WITNESS: It's not very nice with the presence of ladies --

THE COURT: We've heard those things, don't worry about it.

THE WITNESS: Well, I apologize, but he called me on several occasions an ignorant schmuck.

BY MR. HUGHES:

Q Did he call you that, use that expression on a number of occasions prior to the time that he fired you in

writing?

A Yes.

Q Would you have heated words back and forth, is that correct?

A That's correct.

Q During all this time, were you doing your job?

A I certainly was.

Q What were your working hours at LEM?

A Generally from eight -- well, when Joe Samuel was present it required my help a lot with Joe, and I worked from eight or eight-thirty until five, and after Joe Samuel's leaving generally from eight to four-thirty.

Q What were Mr. Lowell's hours?

A Frank generally came in at nine-thirty, and I don't know what time he left. It was after me at any rate most of the time.

THE COURT: After five o'clock or four-thirty?

THE WITNESS: After four-thirty, your Honor. When I was working till five o'clock, we all generally left together, that is, Samuel and Lowell and myself generally closed up at five o'clock.

Q Were there times when he left before five o'clock?

A Why, Frank?

Q And asked you to close the place?

A Yes. As a matter of fact, I have a note that was left from Frank directing me to do that.

Q May I see it, please?

A I might say, Mr. Hughes --

THE COURT: Wait for a question.

Q DO you identify that as his handwriting? (Indicating)

A Yes.

Q He left this note on your desk, is that correct?

A That's correct.

Q DO you recall the time, or approximate time when he did that?

A No, not really. Not really. It's one of several incidents where Frank would leave early and ask me to close at five o'clock, and I would.

MR. HUGHES: I offer it in evidence.

MR. BOYLE: No objection.

(Note above referred to was marked

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Defendant's Exhibit FF in evidence as of this date.)

MR. HUGHES: Your Honor, may I read that to the jury?

THE COURT: Yes.

MR. HUGHES: It's just a short note: "Bob, I may not make it back this afternoon. Please lock up at five." And it has the initials of Mr. Lowell.

BY MR. HUGHES:

Q Coming back to the third firing, will you tell his Honor and the members of the jury about that incident as you now recall it?

THE COURT: You mean when he was finally fired?

MR. HUGHES: Yes, the third time.

A In writing?

Q In writing.

A Well, I had returned --

MR. HUGHES: Three strikes and youre out I guess, your Honor.

A Well, I had returned from vacation that particular week. I believe it was August 7th, on a Monday that I

returned and there were several notes on my desk of which one of them I still have in my possession, and --

Q May I see that, please?

A Yes. Although it was not directed to me. My name is not on it, it was left on my desk.

Q Can you identify the handwriting?

A Yes.

Q Whose is it?

A Mr. Lowell's.

MR. HUGHES: I offer it in evidence.

THE COURT: This is when you got back from your vacation?

THE WITNESS: Yes, your Honor. On August 7th, I believe.

THE COURT: What year?

THE WITNESS: Last year, 1972, your Honor.

MR. BOBBE: No objection.

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(Note above referred to was marked Defendant's Exhibit GG in evidence as of this date.)

MR. HUGHES: Your Honor, I would like to call this to the attention of the jury.

THE COURT: Yes.

MR. HUGHES: It says, "Please send --" and then it lists certain catalogs, and lists the names of the people to whom they should be sent.

BY MR. HUGHES:

Q If I interrupted you, would you go ahead with your explanation to the jury, of the circumstances of this final discharge?

A Well, that week I returned and there was an order in the house that had to be built and shipped, and there was some design work that had to be done that I did layout work and prints that had to be made, and I performed -- these are my regular duties, the first thing being the orders in the house to ship out. I did that first. Then I did the prints that had to be made, worked on that all week, and the first opportunity I had was Friday morning, to start typing up labels and getting these catalogs on that note together to send out.

I was sitting in the office typing out the labels when Frank Lowell walked in and said, "Did you get a chance to send those catalogs to --" and he stopped himself and he saw that I was in the process of sending the catalogs

to these people. He said, "Oh, I see you're doing it now."

I said, "Yes, but, Frank, I'm going to have to stop at Norman's Stationery and pick up larger envelopes," -- because the amount of literature was too much.

Well, for no apparent reason he flew into a rage and said, "Well, why the hell didn't you do this before?"

I said, "It's the first opportunity I had to do it, Frank."

So, we exchanged unpleasantries again. Again I don't know verbatim what words were used, and he said, "Well, you're fired."

Again I said, "Well, Frank, you'll have to contact the Board of Directors because you don't have the authority to fire me."

And he said,"Well, you stop what you're doing immediately and get out of here."

Well, I did stop doing that because I really didn't consider it my job to do it, and I did have other duties to do, so I went about my other tasks in the assembly area and in making prints. And, I stayed the full day as normal, and Frank left that day.

That evening I called Mr. Gibson in Texas, I believe, and I told him what had happened.

Q Mr. Gibson was then the Chairman of the Board of the Defendant LEM, is that correct?

A That's right.

Q And you related this incident to him?

A Yes, I did.

Q Did he give you any instructions or directions at that time?

A Yes, he did. He asked me if I would Xerox copies of my discharge and write a letter to him at Racine and address it to his secretary, I believe, Mrs. Bursser, and a copy was to be given to each Board of Director of the discharge. He told me to report back to work Monday in my regular capacity and go about my duties.

MR. HUGHES: May I see Exhibit 9?

Q Is Plaintiff's Exhibit 9 the letter of discharge to which you refer?

A Yes, it is.

Q That was August 11th. What day of the week was that?

A Friday.

Q You say that Mr. Lowell left the office that evening. When did he next return to the office?

A Well, I did not see Mr. Lowell leave. I

stayed until my regular time, and I just assumed that Mr. Lowell left his regular time.

Q In any case, you came back to the office on Monday?

A That's correct.

Q With Mr. Lowell there?

A No, Mr. Lowell was on vacation. I did not see him for two weeks later.

Q The next time you saw him at the plant was two weeks after that Friday?

A The Monday --

Q The Monday of the two weeks following that Friday?

A Right.

Q Upon your return to the office, did you resume your normal duties?

A Well, no, I didn't. The first thing I did when I came in, I noticed that the catalogs that I started to prepare and all, from this note, were not sent out, and I took it upon myself, the responsibility of finishing the job that I started to do, and I made sure that I sent them out the first thing Monday morning.

Q Then did you resume your normal duties?

A Yes.

Q You had been on vacation and then came back a week before you were discharged, is that correct?

A Yes, sir.

Q That is, you came back on a Monday morning and on the following Friday, August the 11th, you were discharged, is that correct?

A That's correct.

Q During that week, were you at the office every working day of that week?

A Yes, I was.

Q Were you, during that week, performing your normal duties there at the office?

A Yes, I was.

Q And you are clear in your own mind that during that period there wasn't a day that you took off and didn't show up at the office?

A No, I showed up every single day, but when you say clear in mind, I know that it could have been that week or the week after, or at some time I split a tooth at lunch time and one afternoon did go to a dentist. Now, I'm not clear that it may not have been that week. I really don't know.

Q But that was just the time that you took to go to the dentist?

A Yes.

Q During the entire time when you were working with the defendant, did you put in normal regular hours?

A Yes.

Q There has been a suggestion here that you took days off to play golf. Is that true, or is it untrue?

A That's a lie. Any time that I took off was because of medical reasons and/or an emergency of some type that required that anyone would take off, but I did not take off time for leisure like that. There was one afternoon that I left fifteen minutes early with Bill Gay, that I told Frank about, that we had a golf appointment. This was four-fifteen in the afternoon that we left, and Bill Gay made up the fifteen minutes because he did not want to be responsible for time either, taking off from the company. I did not make up the fifteen minutes.

Q Is that the only incident that you can recall involving taking a little time off?

A Yes.

Q You are aware of the fact that Mr. Lowell wrote a letter to Mr. Batten, the president of Twin Disc

Corporation, explaining his reasons for discharging you? You are aware there is such a letter?

A Yes, sir.

Q When did you see that letter for the first time?

A I believe I was subpoenaed for, to take my deposition by Mr. Lowell in May of this year, and at that time a copy of the letter was given to me to read.

Q Now, Mr. Everett, this is Defendant's Exhibit M, and I ask you to keep that before you. I'd like to ask you some questions about it.

You read this, or had it read to you when your deposition was taken that you just described to us, is that correct?

A Yes.

Q This letter says at the top of page 2, "For over a year now Bob has never put in a Saturday, nor has he stayed past four-thirty p.m., regardless of the urgency of our work load."

Is that a correct statement?

A No, that's a lie. The first part, that I never stayed a Saturday, that's true. There was never sufficient work to warrant my coming in on a Saturday, but was there I

certainly would have been there. I stayed after four-thirty at any time Frank requested me to, that he would not be there. I would remain until five o'clock and close the plant.

Q The letter goes on to say, "On the contrary, he has frequently left earlier than four-thirty without word, and has been absent complete days without calling me or offering explanation upon his return."

Is that a true statement?

A That's not true. I was never absent without informing Frank either directly or calling in and letting him know that -- and again, these were for medical reasons, that I was going to be late or not in at all. As a matter of fact, there was one occasion where I had an internal bleeding problem. I was in the hospital at nine o'clock in the morning for some minor surgery, and I came back into work at eleven o'clock that day and even Frank said to me, "Are you crazy coming in here after that?"

Q He goes on to say, "He has repeatedly refused to follow my directions, saying that he will not permit me to question his expertise."

Is that a correct statement?

A That's not true at all.

Q He goes on to say, "He has incited other

employees and very likely is responsible for my difficulties with Joe Samuel and Joe's successor."

Is that true?

A If anything -- no, it's not true. If anything, I acted as a buffer between Joe Samuel and Frank Lowell. I'm sure that they would have had this argument long before had I not intervened several times.

Q It goes on to say, "Bob has been publicly disrespectful and surly, loudly stating that I have no authority over him."

Is that a correct statement?

A Can I take that part by part?

Q Yes.

A I never said that Frank did not have authority over me. I never made that statement. It is very possible there are a number of times that Frank and I had arguments in the shop where I asked Frank to act as the president of the company, and conduct himself as a gentleman, and if he had something to say to me to do it in the office, not in front of my people and the people out there. And, I'm sure that I probably did say things that were not too pleasant in the exchange in our argument.

Q It goes on to say, "Despite my constant efforts

to stimulate him he has deliberately refused to learn any electronics and remains essentially ignorant of our technology."

A I'm not an electronic engineer. I was not hired to learn electronics, but to perform my duties in the field of manufacturing, where I feel my expertise is, and in my management of people in being able to organize, and in assembly area, I performed my duties as I was hired to do.

Q He goes on to say, "The quality of his work as an assembler has declined and has led to customer complaints which he reacts to by blaming our designs on the customers' ineptness."

Is that a true statement?

A Not at all.

Q Did you, right up to the time of your discharge, continue to perform your work of assembling these units in the same way you had always done it?

A Yes. I might also add that myself or someone at engineering inspected the same units which we built, which really isn't the best thing in the world to do. Someone else should examine them. Frank was head of the inspection and Quality Control, but we did the inspection of the units.

Q It goes on to say, "Though his failure to keep track of our inventory results in parts shortages at critical

times, he does not expedite corrective action as I request."

Is that a truthful statement?

A No, that's a lie, the lie being that Frank limited me to keeping an inventory that I would not like to have kept. In other words, there are certain parts that were very hard to come by. The delivery of them could be anywhere from two to six to eight weeks. Specifically, there was a part manufactured by Burroughs Manufacturing Company, a Nixie tube (phonetic) assembly that went into a display unit, and I knew that Joe Samuel at one time, and Frank Lowell, priced out buying in quantities of ten, and we could get a reduction in price that way, and I would have liked to have kept ten in stock. But, Frank would not permit us to keep more than one or two in stock at any time.

There were other items, connectors and discs for encoders. As a matter of fact, I even have a note where I told Frank too, that we were running low on discs, and we had to buy discs.

Q Have you got that note?

A Yes, I do, and I kept Frank informed of what our inventory was all the time. That's how he would know --

Q Go ahead.

A (Continuing) -- the amount of inventory.

These are specific items I'm referring to. Other inventory in general we never ran out of. We were always stocked completely, enough to build twenty-five units or more of any of our standard assemblies.

Q I show you this paper which you have produced and ask you whether you can identify that as Mr. Lowell's handwriting.

A Yes.

MR. HUGHES: I offer it in evidence.

MR. BOBEE: No objection.

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(Document above referred to was marked Defendant's Exhibit HH in evidence as of this date.)

MR. HUGHES: May I read this to the jury, your Honor?

THE COURT: Yes.

MR. HUGHES: "6/16/72. Bob, order 51 pieces of 100 count disc for inventory."

BY MR. HUGHES:

Q And are those the initials of Mr. Lowell there?

A Mr. Lowell, yes.

Q You were describing as part of your duties, to do inventory, is that correct?

A Yes.

Q Did you fulfill those duties regularly and to the best of your ability?

A Yes. I cannot recall any instance that we didn't somehow manage to get an order out on time. The problems that did arise that we did have some sample units, where we had displays for sales purposes, and these particular Buroughs cards that I referred to, we had to remove them from the instrument and place them in the customer's instrument because we couldn't get the delivery of the cards in time, and those instances are the only times that I can ever recall being under pressure to get a unit out because the lack of a part.

Q This letter goes on to say, "In summary, Bob has not developed as a manager capable of sharing the load sufficiently to allow me more time for planning and selling, but he has instead lost those very qualities of pride in work, diligence, loyalty, willingness to learn, and attention to details which made him a desirable associate during our earlier years together."

Is that a true statement?

A No, sir. It is not. I am no different today than I have ever been.

Q And you're working today?

A Yes, I am.

Q In your own business?

A Yes, sir.

Q After you were discharged, you went back to work on your own, is that correct?

A Yes. I run a machine shop.

Q During the time that you were employed by LEM, did you have contacts or dealings with any people at Twin Disc Corporation?

A Yes, I was on the Board of Directors.

Q Were you on the Board of Directors of LEM?

A Yes.

Q Were you not on the Board of Directors of Twin Disc Corporation?

A No, I wasn't.

Q Did you have dealings with people who were connected with Twin Disc Corporation?

A Yes. Some of the same people were on the Board of Directors of LEM.

Q Were your relationships with LEM friendly and cordial through the years?

A Yes, they were.

Q When Mr. Lowell got back after his vacation, can you describe for us the relationship between you and him at that point?

A Well, there really was no contact verbally made generally speaking. We did not speak to each other, and directions from Mr. Lowell were in the form of a note thrown on my desk. I have a couple of notes relating to instances where Mr. Gibson must have called Mr. Lowell to tell him he was coming, and they were left on my desk to inform me of this, and this is generally the way we conducted business at the time.

Q Well, could I describe it as a cool relationship?

A Yes.

Q I show you a letter dated September 3, 1972, and ask you if that is a letter which you wrote to Mr. Gibson at or about the date it bears.

A Yes, it is.

MR. HUGHES: I offer that in evidence.

MR. BOBBE: I object to that as not binding on the Plaintiff.

THE COURT: Let me take a look at it.

This was written after the letter which Mr. Lowell had sent to Mr. Batten?

MR. HUGHES: Yes, your Honor. A later date.

THE COURT: Objection overruled.

***** (Document above referred to was marked defendant's Exhibit II in evidence as of this date.)

MR. HUGHES: May I read it to the jury, your Honor?

THE COURT: Yes.

(Whereupon, Mr. Hughes read defendant's Exhibit II in evidence to the jury.)

BY MR. HUGHES:

Q Mr. Everett, does this letter accurately record the incident that it purports to describe?

A Yes, because at the time it was clear in my mind, and I wrote it then.

Q Mr. Everett, there has been a suggestion here that you were told by the management of Twin Disc not to take out the life insurance benefits. Were you ever told any such thing?

A No. On the contrary, I have my records that show that I had contact with a Mr. Dick McGuire, I think, who was a agent hired by Twin Disc, and he arranged for me to

a physical in my neighborhood, and I did with a doctor, and he sent me reports which I still have and never completed because Frank Lowell did not go through with it for some reason, and he asked me to hold up on it. Frank asked me to hold up on it until he was ready, and we would complete them together.

Q Did Mr. Gibson ever tell you to hold up on it?

A No, Mr. Gibson wanted me to do it right away. These are my personal records of it that relate to it. I don't know if you want to see them.

Q May I see them, please?

A I did take that physical, incidentally, and never did follow through on it.

Q I show you a letter and ask you if this is a copy of a letter that you wrote to Mr. Richard P. McGuire on January 15, 1969.

A Yes, sir, this is a copy of the letter.

MR. HUGHES: Your Honor, for the moment I have myself out of order here.

Q I show you a letter dated January 10, 1969 from Mr. McGuire to you. Do you identify that as a letter you received from him?

A Yes.

MR. HUGHES: I offer that letter in evidence.

MR. BOBBE: No objection.

*****

(Letter dated January 10, 1969 was marked Defendant's JJ in evidence as of this date.)

MR. HUGHES: Your Honor, with your permission, I am going to read it to the jury.

THE COURT: All right.

(Whereupon, Mr. Hughes read Defendant's Exhibit JJ in evidence to the jury.)

BY MR. HUGHES:

Q Did you then write a letter of January 15, 1969, which I showed you a moment ago, and which I will show you again?

A Yes.

MR. HUGHES: I offer that in evidence, your Honor.

MR. BOBBE: I think it has already been introduced.

MR. HUGHES: No, I haven't offered it yet.

MR. BOBBE: No objection.

*****

(Letter dated January 15, 1969 was marked defendant's Exhibit KK in evidence as of this date.)

MR. HUGHES: May I read it, your Honor?

THE COURT: Yes.

(Whereupon, defendant's Exhibit KK in evidence was read to the jury.)

MR. HUGHES: Your Honor, that completes the direct examination.

THE COURT: Cross examine, Mr. Bobbe.

CROSS EXAMINATION

BY MR. BOBBE:

Q Mr. Everett, I think you said that you are in your own business?

A Yes.

Q Do you have a partner?

A Yes, I do, Mr. Bobbe.

Q Isn't he one of the owners of the business?

A Yes.

Q What is his name?

A Bill Gay, my former foreman at LEM.

Q I see, and he was discharged when?

A When we were all terminated. I believe the

date is October 11, 1972.

Q Everybody in the place was discharged at the same time, is that correct?

A Yes.

Q When did you form your business with Mr. Gay?

A Oh, it is incorporated as of February of this year.

Q When did you first go into business with Mr. Gay?

A When we incorporated in February, I would imagine.

Q You testified that when Mr. Lowell gave you a note giving a list of names, and left it on your desk when you returned from your vacation, as to people to whom to ship the catalogs, did he have any talk to you about that in addition to leaving the note on your desk?

A No, there were other notes on my desk besides that.

Q No, I'm talking about that note.

A No.

Q Didn't he talk to you and ask you -- tell you that he would want you to ship those catalogs out?

A No, sir.

Q Didn't he say, "I'm leaving addresses on your desk so you know where to ship them?"

A No, sir.

Q You say it wasn't your duty to do this but you were ~~will~~ to do it anyway, is that right?

A I would do anything at all that was beneficial, yes.

Q And one of your duties was to ship things, wasn't it?

A Well, I was not employed to ship things, I was employed as head of manufacturing and purchasing.

Q I'm not asking what you were employed to do, but wasn't that one of the duties that you undertook to perform?

A Yes, that I undertook to do, yes, Mr. Bobbe, that's correct. That is, I undertook the job of packaging and shipping the units to customers.

Q Did you do any other shipping that was required?

A Yes, I did. But as a general rule, I did not ship literature; Mr. Lowell did. He generally took care of delivering and shipping of mail to customers.

Q When he told you that you were fired, did you say to him, "You can't fire me because I am an officer of the

corporation"?

A At what time, Mr. Bobbe? He fired me on three occasions.

Q I'm talking of the last occasion.

A In writing?

Q Yes.

A Yes, I told Mr. Lowell that he had better call the Board of Directors before he fires me because he does not have the authority to do it.

Q Did you know that the bylaws give him the authority as president and general manager, to run the company?

A Yes, I knew as president of the company he was to run it.

Q What made you think that he had to call on the Board of Directors to fire an employee?

A I believe that either my attorney told me, or perhaps, at one time Mr. Lowell might even have told me that, in years past. I don't really know how I do know that.

Q Well, didn't you tell him, "I'm an officer of the corporation. You can't fire me"?

A Yes.

Q And what basis did you have for saying that?

A From the knowledge that I just related, that

I was informed that it required either the shareholders or the Board of Directors to fire me.

Q You said because you were an officer he couldn't fire you. That's what you told him, didn't you?

A No, I won't say that that's the -- officer I don't think is the right word.

Q You don't think it is?

A I don't think I said officer.

Q Let me call your attention to the fact that you were examined before trial or were examined as a witness, I should say. DO you remember --

MR. HUGHES: Page, please?

MR. BOBBE: On page 9.

Q You were talking about what happened on August 11, 1972: "Mr. Lowell was very aggravated this wasn't done before, which I might say it was really not my job to do. I was very much involved with other things and the sales portions of the corporation was not my job or responsibility. However, I never refused to do anything, and that's why I was doing it. Again in his abusiveness at the time, which I don't recall the exact words we exchanged -- I'm sure some unpleasantries, and he walked into the office and came back out. I went back with my duties outside, and when he walked

out, he said, 'Don't bother doing that.' I went about doing other things, other duties I had, and I came back in at lunch time, I guess a little after lunch time. I don't recall exactly. And, there was this letter on my desk at which time I told him he couldn't fire me, I was an officer of the corporation."

Do you remember giving that testimony?

A Well, if it's there, Mr. Bobbe, I gave that testimony.

Q Was that true?

A Was what true?

Q That testimony?

A That I said officer?

Q Yes.

A I guess so. You asked me if I remembered saying it, and I --

Q And you were under the impression that an officer of the corporation could do as he wished and could not be fired because he was an officer?

A Of course not.

Q Why did you say he couldn't fire you because you were an officer?

A I said that Mr. Lowell could not fire me

because I was either informed in the past by Mr. Lowell or by my attorney, at other times, that it required the Board of Directors or the sole shareholder of the corporation to fire me.

Q When did your attorney tell you that?

A I don't know.

Q Did you consult an attorney before you were fired?

A I have an in-law who is an attorney and who read my contract years ago.

Q Did your attorney tell you that because you were an officer you could not be fired?

A Mr. Bobbe, I'm repeating myself.

MR. HUGHES: I object, your Honor. That isn't the testimony of this witness. The issue is whether Mr. Lowell could fire him.

THE COURT: Yes.

Q Did you consult an attorney as to whether or not Mr. Lowell could fire you or could not fire you because you were an officer?

A I did not hire an attorney for that purpose. I repeat, I knew this from the past.

Q You testified that you were in the process of

writing out the labels when Mr. Lowell saw you doing that, is that right?

A I was typing the labels at the typewriter, yes.

Q Is there any reason why he would be able to know that these were the labels for the purpose of shipping out these catalogs?

A Yes, sir. He looked.

Q He looked?

A He looked at what I was doing.

Q Is it your testimony that despite the fact that he saw what you were doing he was still very aggravated that you hadn't done it before, is that it?

A No, sir. That's not what I said. I said that when I told him that I would have to go to Norman's Stationery and secure larger envelopes, because there was too much literature, they would not fit in our standard size envelope, then he became irate, and we got into a heated discussion, and he said why didn't I do it before.

Q Why didn't you get the envelopes before?

A I stated, Mr. Bobbe, that that was the first opportunity, Friday morning of that week, that allowed me the time to do that.

Q You testified about the incident with Mr. Samuel,

and you had to intercede between the two. Was it because one or the other was threatening with physical violence?

A I felt both. I felt both were at a point that something might occur physically.

Q Don't you know that Mr. Samuel was the one who was threatening Mr. Lowell with physical violence?

A No, I think Frank was as irate in that argument and as heated as Mr. Samuel was.

Q I'm not asking whether he was irate, but I'm asking whether you didn't observe that Mr. Samuel was threatening Mr. Lowell with physical violence.

A I truthfully cannot say either one of them was the aggressor. I thought both of them were in the process of doing something physical.

Q Did you see Mr. Lowell do anything physical?

A No, sir.

Q Is Mr. Samuel in Court now?

A Yes, he is.

MR. BOBBE: Will Mr. Samuel please stand?

(Individual stands in the Courtroom.)

Q Isn't it a fact that Mr. Samuel is a much bigger man than Mr. Lowell?

MR. HUGHES: I'll concede that, your Honor.

THE COURT: I don't know why we need spend so much time on this particular part of what happened. They did have their differences.

Q During the time that Mr. Samuel returned to work after he was fired, didn't he go ahead and perform his work without any difficulty?

A Yes, sir.

Q And didn't Mr. Everett try to persuade him to remain there after the --

THE COURT: Mr. Everett?

Q Didn't Mr. Lowell try to persuade him to remain there after he said he was going to leave?

A I testified a little earlier that the day I had requested Frank to talk to Joe to remain several times, the day that Joe told me he had finished his work and was leaving, Mr. Lowell called him in the office and did try to persuade Joe to stay.

Q And Joe said he had other commitments and he was going into his own business, didn't he?

A Well, more than that. He said that he couldn't possibly work with Mr. Lowell any more and that in the interim

he couldn't be without work, and he was -- I think he had prospects of entering business with his brother-in-law, or brother, and a friend, I'm not sure exactly. I'm not clear on that.

Q Did he say that to Mr. Lowell?

A In front of us, yes.

Q He said to Mr. Lowell, "I can't work with you any more"?

A Yes, he did.

Q You are sure about that?

A Yes, I am.

Q When you called up Mr. Gibson on the evening of the day that you -- that Mr. Lowell told you you were discharged, August 11th, how did you know Mr. Gibson's telephone number?

A Well, Mr. Gibson gave us his telephone number. I had it in our book in the office, his home in Texas and New Mexico, and at Twin Disc, in case of emergency, where I could reach him at any of these places, but generally to call Wisconsin and they would get in touch with him.

Q Were you very friendly with Mr. Gibson?

A I was, and still am.

Q And he would call you on social occasions?

A Yes, we have socialized together.

Q Did he ever call you and discuss the business in the absence of Mr. Lowell?

A We rarely discussed business when we socialized.

Q Wasn't there an occasion in March of 1972 when Mr. Gibson met you in Plainview, at the Hilton Hotel there, to discuss the affairs of LEM Instrument in the absence of Mr. Lowell?

A Yes. This was not a social meeting. This was a business meeting. It wasn't a Hilton Hotel; it was a motel, either the Kings Grant, or the Holiday Inn, I don't recall which.

Q Well, at a hotel or motel in Plainview?

A A motel, yes.

Q How was that meeting arranged?

A I believe Mr. Gibson called me and stated he was coming east, and would I meet him to discuss the problem that existed.

Q He called you first?

A I'm not sure. I'm not sure whether I called him or -- I'd have to clarify in my mind the date of that meeting and perhaps I would know better.

Q Suppose I suggest it was March 3, 1972?

A March of '72?

Q Yes.

A I don't know whether I called Mr. Gibson or he called me.

Q You stated you discussed the problems. What problems?

A Whatever were the questions at the time.

Q What problems do you recall you wanted to discuss with Mr. Gibson?

A The problems that were existing with Frank and myself, I should imagine.

Q What were those problems?

A Well, we certainly were not getting along.

Q At that meeting, didn't you tell Mr. Gibson that you thought Mr. Lowell was in need of psychiatric attention?

A I told Mr. Lowell directly himself in his office one day, when we were more friendly, that I thought he should seek help, psychiatric help, that his conduct was certainly not normal.

Q In what respect?

A And I also told Mr. Gibson at that time when he asked me what was wrong with Frank. I said, "I think

he's sick. I think he needs help."

Q Mr. Everett, what symptoms did Mr. Lowell show you that made you think he was sick?

A Erratic behavior and shouting and screaming.

Q What was the erratic behavior?

A His whole mannerism, the way he would approach things, in a frantic type of way and shout and scream at small incidents that really meant nothing. His conduct to me, in calling me, again, I repeat, an ignorant schmuck.

Q Wasn't it because he tried to get you to get work out on time?

A Mr. Bobbe, I would like to know any order in the house that Mr. Lowell can state that was directly related to me that didn't get out in time. I can't think of one at any time.

Q Wasn't it your complaint to Mr. Gibson that Mr. Lowell was pushing you too hard?

A Absolutely not.

Q No?

A I listed with Mr. Gibson what duties I was performing because they weren't being done. The engineering portion of the work that was done there I took upon myself to do, the prints and the drawings, and the layouts, because

there was no one else to do them.

Q Didn't you also complain to Mr. Gibson that your help was being ruined by the fact that you were being pushed too hard?

A I complained that -- yes, that Frank's attitude toward me and in general was affecting my health, and I seriously thought of leaving the corporation.

Q But you didn't, did you?

A No. Mr. Gibson asked me to hold on, that things would work out.

Q Did you know that this conversation was being ~~typed~~ taped?

A Yes, I did.

Q And you consented to its being taped?

A Oh, yes.

Q Mr. Lowell was not aware of this meeting between you and Mr. Gibson, was he?

A No.

Q Didn't Mr. Gibson ask you to keep it confidential?

A Yes.

Q In addition to that meeting, didn't you have several telephone calls with Mr. Gibson which were not revealed

to Mr. Lowell?

A I'm sure we had, yes.

Q Did you know that any of those telephone calls were being taped?

A No, sir.

Q You weren't told about that, were you?

A No, sir.

Q Did you ever visit Mr. Gibson socially?

A Mr. Gibson visited with me at my home socially, yes.

Q Did you ever visit him socially?

A Not at his home, no.

Q Where did you visit him socially?

A Well, we went out to dinner or something like that.

Q Did you become acquainted with his wife?

A Yes.

Q Where did you become acquainted with her?

A I invited them to my --

THE COURT: What is the importance of this? He says they were friendly and they socialized. I don't know that we have to waste any more time on that.

MR. BOBBE: All right. I'll not pursue that any further, your Honor.

Q You were also consulting the doctor about some mental problems, weren't you?

A No.

MR. HUGHES: I'm sorry, I didn't hear that question.

THE COURT: That he was consulting a doctor about some mental problems also.

THE WITNESS: No.

Q Didn't you tell --

A No, never in my life did I have any mental problems, but I did go to my family physician, and because of a nervous problem I was very much on edge. He suggested that if I feel nervous to take some Librium when I felt I needed it, which is a mild sedation.

Q And you did take Librium?

A On occasion, yes.

Q Didn't you take it to the point --

THE COURT: What has all this to do with the issues here?

THE WITNESS: I have taken Librium this morning incidentally.

THE COURT: Never mind that. I took aspirin this morning.

Q After you read the letter of September 3rd, which is Exhibit JJ --

MR. KHEEL: Exhibit II.

Q (Continuing) II, to Mr. Gibson, telling about the typewriter ribbon incident, did you get any reply from Mr. Gibson?

A I'm sure I did. I don't recall whether he called me. I think he did call me, yes.

Q Do you know when he called you?

A The date, no, I don't. It was within a reasonable time after the letter.

Q Now, that typewriter ribbon, will you describe what the type of ribbon it was?

A Yes, it's a carbon ribbon that runs through a typewriter once and is not usable again. It goes from one side to the other, and then it's a very thin type of thing.

Q And the impressions on the typewriter ribbon are such that they are legible to anyone who wants to read those impressions, isn't that so?

A Yes.

Q Is it your testimony that you took the ribbon

and threw it in the garbage?

A That's correct.

Q Where is the garbage?

A Well, there is a barrel outside -- there was a wastepaper basket underneath my desk which subsequently you would throw it in and then empty the wastepaper basket in a barrel that was outside the door, and on this occasion, that's where it was dumped, from my waste basket outside in this barrel.

Q You mean you first put it in the waste basket and then took it to the barrel?

A Yes.

Q Didn't you take it to your car?

A No.

Q You said that you were going to see that John Batten was able to see the ribbon, is that right?

A Yes, I stated if it was so important I would keep the ribbon and deliver it to Mr. Batten myself.

Q Didn't you know that the letter itself was addressed to Mr. Batten?

A Well, I wasn't sure what was on the ribbon, Mr. Bobbe. I only knew that Mr. Lowell said, "I typed a very important personal letter to Mr. Batten on that ribbon,"

and I didn't know why a personal letter to Mr. Batten was so important. I thought there may have been other things on that ribbon that Frank did not want me to see because I didn't trust Frank, and when he stated that I kept the ribbon.

Q But you wanted to give the ribbon to Mr. Batten?

A Right.

Q You knew that Mr. Batten was going to get the letter, didn't you?

A Yes, I did.

Q Well, why would he be interested in the ribbon?

A For what other information might be on it.

Q What other information?

A I don't know. I did read part of it after that which was part of a letter to Batten, but the ribbon is so long, so involved and so messed up that it would take a lot of work for someone to straighten out the ribbon and read it. I don't know to this day that there isn't a lot of information on there that might be important to me. Perhaps I will take the time to read it.

Q You testified about the difficulties with Mr. Lowell, including two previous firings. Did you ever communicate these facts to the members of the Board prior to

August 11th?

A Well, I consider Mr. Gibson the Chairman of the Board, as a member of the Board, and I communicated the facts to him.

Q Did you ever communicate the fact that Mr. Lowell had discharged you on two prior occasions?

A No,,I didn't.

Q Did you ever tell any member of the Board that you were having difficulties with Mr. Lowell prior to this meeting with Mr. Gibson on March 3, 1972?

A Yes.

Q When?

A On the occasion with Joe Samuel's firing. I was also asked, "Well, how is your relationship with Frank Lowell?" And I said, "Not too good."

Q When was this?

A When Joe Samuel -- just prior to Joe Samuel's firing.

Q And that's the extent of what you told anybody representing --

A No, I'm sure it isn't, Mr. Bobbe. I'm sure I related more facts than that, but I don't recall verbatim what I said.

Q You recall that Mr. Lowell submitted monthly reports to the Board of Directors, don't you?

A I didn't see the reports, but I know -- I know that he did. But, I did not see the reports. He did not give me a copy.

Q Didn't you get a copy of each monthly report?

A I did not.

Q I show you these reports of LEM Instrument Corporation dated February 12, 1972, March 10, 1972, April 3, 1972, May 13, 1972, June 5, 1972, July 17, 1972, August 11, 1972 and September 15, 1972, and ask you, do you still maintain that none of these reports were furnished to you?

THE COURT: Is there any contention here that he was entitled to a copy of these reports?

MR. BOBBE: He was a director. These were sent to all the directors. This was addressed to him as well as the others.

THE COURT: Suppose he got them, what bearing has that on the issues?

MR. BOBBE: I'll follow it up, sir.

THE COURT: All right.

THE WITNESS: Well, the truth of the

matter is that my name is on every one of these, and I did not receive any of these reports that I just glanced through in a hurry. To the best of my knowledge, I have never received these reports.

BY MR. BOBBE:

Q Mr. Everett, you acted as secretary of the corporation -- I'll withdraw that.

MR. BOBBE: Is it conceded these reports are directed to all of the directors, including Mr. Everett?

MR. HUGHES: Can I see them?

MR. BOBBE: Sure.

THE COURT: I think we will take a short recess at this time.

Members of the jury, don't discuss the case. Keep an open mind on this, and form no opinion at this time. We will send for you shortly.

(Whereupon, a recess was declared.)

(After the recess the jury returned to the Courtroom and the following occurred:)

MR. HUGHES: Your Honor, when we

recessed, Mr. Bobbe asked me to make a concession, and I concede that this batch of documents which has been identified as reports are addressed to the Board of Directors, and that among those listed appears the name of Mr. Everett. However, I don't -- that does not mean that I am conceding that he received these reports, and I would like to call attention to the fact that similar reports are already in evidence as Defendant's Exhibits H, I and J, and I notice that his name is not on those particular reports.

THE COURT: Well, with the limited concession, in other words --

MR. HUGHES: His name is on there.

THE COURT: Those are reports made by the Plaintiff to the Board of Directors which are allegedly addressed to -- let me put it this way: They indicate that they were addressed to each member of the Board, but the concession does not indicate that this witness did in fact receive them?

MR. HUGHES: Yes, your Honor.

BY MR. BOBBE:

Q Mr. Everett, as secretary of the Board you prepared the minutes of the Board of Directors' meetings, didn't you?

A Yes, I did.

Q Did you ever report at any of those meetings any difficulties with Mr. Lowell?

A No, I did not.

Q Did you ever discuss at any Board of Directors' meetings such difficulties with Mr. Lowell?

A No, I did not.

Q You testified on your direct examination that Mr. Samuel overheard some remarks that Mr. Lowell madeabout Mr. Samuel. Do you recall that? What was it that you heard Mr. Lowell make?

A I stated before that I could not quote verbatim, and I did not remember what the exact remarks were.

Q You don't remember whether he said that Mr. Samuel had not done the work in the order that he had requested? Does that refresh your recollection at all?

A No, I don't recall that.

Q Do you recall that when the two got into an argument that Mr. Samuel threw a saw at Mr. Lowell?

A A saw? No. I think Mr. Samuel had -- to the best of my knowledge, he had a pencil in his hand, and I don't think he threw it at Mr. Lowell, but I think he threw it on the floor and it hit me in the hand.

Q You don't recall whether he threw a saw or not?

A No, I think it was a pencil, Mr. Bobbe, that he threw on the floor, and again I say it hit me in the hand.

Q Isn't it a fact that in taking -- that you have been taking tranquilizers in excessive quantities, and you have complained of numbness in your face to Mr. Lowell?

A No, that's not true at all.

THE COURT: What has that got to do with it?

MR. BOBBE: Well, only on the question of credibility.

THE COURT: We are not going into the health of every witness here.

MR. BOBBE: I understand.

THE WITNESS: I'm a pretty healthy guy.

BY MR. BOBBE:

Q When you received the notice of discharge on October 9, 1972, from Mr. Gibson, did you ask Mr. Gibson the

reason why you were being discharged?

A Yes, I did.

Q What did he say?

A He said he was not at liberty at this time to tell me anything other than to give me this notice of discharge.

Q What did you say to that?

A I said, "Well, I'd like to know why."

Q Did he still refuse to tell you?

A Yes, he did.

Q Did you ever find out why?

A No, I did not.

Q Did you ever bring suit on your contract?

A I have no legal suit at present, but I do have an attorney who is representing my claims against Twin Disc, and I just feel that these people have been honorable with me in the past, and I won't have any problems settling my claim with them now. But, it's in the hands of my attorney.

Q Isn't it a fact you told Mr. Gibson when you met him in March that you wouldn't make any claim against Twin Disc?

A No, that's not a fact.

Q Didn't you threaten Mr. Lowell, bring suit

against him for causing your final discharge on October 9th?

A Yes, I -- I don't know what the word threaten implies legally, but I did say to Mr. Lowell on two occasions that "It is very likely that when I find out the reasons for my discharge that I may be suing you, Frank."

Q But you never yet found out the reasons?

A I have not to this day been told what the reasons for my discharge were, no.

MR. BOBBE: That's all.

MR. HUGHES: I have no other questions, your Honor.

THE COURT: Step down.

(Whereupon, the witness was excused by the Court.)

THE COURT: Next witness.

MR. HUGHES: Mr. Joseph Samuel, please.

J O S E P H S A M U E L, of 12 6th Street, Westbury, New York, called to testify in behalf of the Defendant, and being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HUGHES:

Q Mr. Samuel, were you subpoenaed by the

Defendant to appear and testify today?

A Yes, I was.

Q You are presently employed, are you?

A I am a consulting engineer.

Q Were you employed by LEM Instrument Corporation at one time?

A Yes, I was.

Q Can you give me the period or approximate period of your employment?

A Yes, it was from January 15 of 1969 to sometime the end of May, in '71.

Q What were your duties at LEM Instrument Corporation?

A Well, I was hired as a project development engineer to design and, well, come up with a complete line of new products for the company.

MR. BOBBE: Would the witness please speak a little louder?

THE COURT: Yes. Keep your voice up.

A I thought it was fairly high.

THE COURT: Well, I could hear you, but apparently counsel can't.

Q Did you engage in that specifically? Did you engage in that work?

A More so than anything else, yes.

Q In fact, you invented the encoder that we have been talking about in this case, is that correct?

A Yes, that's correct.

Q There was a patent applied for on that encoder also, is that correct?

A That's correct.

Q In connection with the application for that patent, did you have occasion to talk with the lawyers, the lawyer for the company?

A The patent attorney?

Q Yes.

A Yes. As a matter of fact, Frank and I made a trip to Milwaukee and spent some time with Jim Millus (phonetic).

Q In connection with a patent, a part of what you do on an application is to describe the disclosure in the patent, correct?

A That's correct.

Q That's sort of a technical statement, is it not?

A Yes.

Q Who drafted the text of that disclosure for your patent?

A I did.

Q Then you and Mr. Lowell went out and had a further discussion with the attorney?

A That's correct. They didn't quite understand some of the context of the disclosure.

Q And you and he went over the text of the disclosure and made changes and corrections?

A Yes.

Q You and Mr. Lowell and the attorney working together?

A That's correct.

Q But the initial draft of the disclosure was yours, is that correct?

A Yes.

Q Would it be correct to say that this encoder and its development was your idea?

A Yes.

Q In connection with your work, was it necessary to have plans and drawings and technical instruments of that type?

A Yes, of course.

Q Who did that type of work?

A Bob Everett and myself for the most part.

Q While you were employed at LEM, did you have day-to-day contact with Mr. Lowell?

A Yes.

Q Was the shop a large or a small place?

A A fairly small place, as mentioned by Mr. Everett. It was about 2,200 square feet, and you could hardly not, you know, have some sort of social intercourse with the people you were working.

Q Would you say it was about the size of this Courtroom, the whole thing?

A A little longer, we'll say, but just about the same width.

Q During the time when you were employed by LEM, how did you hit it off with Mr. Lowell, if I may use that expression?

A Well, we had our confrontations. Pretty regularly, I would say that was. If I could use the word abuse, I used to get some abuse just about every day for one thing or the other, you know.

MR. BOBBE: I move to strike it out

as stating a conclusion.

THE COURT: Sustained. The jury will disregard the word abuse.

Q Did he call you names?

A At times I was an incompetent idiot.

MR. BOBBE: I beg your pardon?

THE WITNESS: Incompetent idiot.

Q Did he use any other expressions that you can recall?

A Schmuck. There were several others. I just can't bring them to mind at the present.

Q This was duirng the period prior to the time when he discharged you, is that correct?

A Yes.

Q Did there come a time when he discharged you?

A Yes, there did.

Q When was that?

A I believe the latter part of May.

Q Of 1971?

A Of 1971.

Q Would you just tell his Honor and the members of the jury about that incident as you now recall it?

A Well, I was in the assembly area which is a

little room just adjacent to the front office, to the general office, and I was performing whatever duties I had to perform at that particular time, and I heard Mr. Lowell with his voice raised, shouting and yelling, and my name was mentioned, that I'm stupid, I'm incompetent, I didn't do it the way --

Q By whom?

A I didn't do things the way he wanted, and a couple of swear words, nothing too bad, and I didn't like the context of what he was saying.

Then he came, him and Bob came out into the assembly area, and I let him know that I didn't like it and that I had heard it. Then we had a little, a few words between the two of us, and he told me that I'm fired, to get out.

Q Were you angry yourself?

A Oh, yes.

Q And he was angry?

A That's correct.

Q And you were arguing back and forth with each other?

A That's correct.

Q Then you say he told you to get out?

A He said, "Get out, you're fired."

I said, "Okay, fine. I just want to take my personal belongings, and I'll leave."

He says, "You can't take nothing out of here. I'm going to call the police if you don't get out of here right now."

So I said, "Well, you go ahead and call the police," I said,"But these are my personal items that I'm going to take when I leave."

And then Bob spoke to him. Meanwhile, I just packed up my stuff in some of the cartons that were laying around, and I left.

Q Did there come a time when you came back to LEM for a short while?

A Yes. I guess it must have been about a week later I got a call from Bob Everett.

Q Can you tell us about that, please?

A Yes. He asked me would I consider returning because we were in the middle of a new design and there wasn't anyone else that could help finish the thing. So, I said, no, that I didn't want to come back, I just couldn't take any more abuse, and that's exactly what it was.

So he says, "All right. I'll tell you what. As a personal favor to me, would you come back and just help

us finish up the designs, and then if you want to leave, leave."

So, he put it that way, and I have known Bob for quite a few years. So I said "All right, Bob. I'll come back just to finish up the designs that I'm in the middle of, and get the units out. You don't even have to pay me. I'm doing this for you, all right?"

So it was arranged that I come back the next Monday, and I did, and we worked pretty diligently trying to get everything done, you know, in a short period of time, because --

Q Well, were you working with Everett during this period of time?

A Yes.

Q Did you have any contacts of any kind with Lowell during this time?

A Yes. You know, we --

Q It was a pretty small place, right?

A Very small.

MR. BOBBE: You interrupted the witness. He hadn't finished.

A (Continuing) No. I said there were no more agruments. That was all behind us. I didn't hold any grudge, and neither did Frank apparently, and we decided that

we were going to get the work done on some amiable basis, you know, and just concentrate on getting the work done, and it worked out okay.

Q The work was done?

A The work was completed.

Q When the work was finished, then what happened?

A About a week before -- well, maybe just a couple of days before, when I saw that everything was going to be completed by the end of the week, I told Bob that I would be leaving that Friday. Later on Bob mentioned to me that he had informed Frank. I didn't hear anything from Frank until the Friday afternoon that I was leaving, and he sort of mentioned that I, you know, should remain, you know, and let bygones be bygones, that I sort of owed a debt of gratitude to the company, and that I shouldn't leave. I told him I couldn't take any more of the abuse, it was almost every day, and I was just, you know, tired of it and didn't want to take any more, plus the fact that I had, you know, not really any plans, but my brother and I were discussing getting into the television repair business again.

Well, it never did come to pass, but as an alternate of not working, you know, working at all, that was something that I could do. So, that was how it ended.

THE COURT: Well, you refused to stay?

THE WITNESS: Well, no. I didn't say I refused to stay. I had met the obligation that I set forth, your Honor.

THE COURT: But they wanted you to continue. The Plaintiff asked you to stay, did he?

THE WITNESS: Asked me to come back.

THE COURT: To come back?

THE WITNESS: Not to stay. I was fired, your Honor.

THE COURT: I understand that.

THE WITNESS: Okay.

THE COURT: But you did go back and finished the job, the things you were working on?

THE WITNESS: That was my only commitment.

THE COURT: I understand that, and then did the Plaintiff ask you to come back and work regularly as you had been before he said you were fired?

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THE WITNESS: That was my only commitment.

THE COURT: I understand that, and then did the Plaintiff ask you to come back and work regularly as you had been before he said you were fired?

THE WITNESS: He asked me --

THE COURT: And?

THE WITNESS: And I refused.

THE COURT: All right.

BY MR. HUGHES:

Q I understood you to say that you and Mr. Everett had known each other for many years, is that correct?

A Ten years, ten or twelve years, maybe.

Q Were your relationships friendly and cordial?

A All the time.

Q Do you recall any instance in which Mr. Everett ever said to you in words or in substance, referring to Mr. Lowell, "Here comes your white boss."?

A Never.

Q You were there at the plant from day to day. What was Mr. Lowell doing as you had the opportunity to see him and observe him?

A Well, Mr. Lowell I guess had the main responsibility to manage the company and to handle the general sales efforts, and that's what I understand that he was doing.

Q Were you in a position to see and observe what he was doing there from time to time?

A Well, at times, we worked together on the sales

efforts. We got a brochure together, and we used to both mail them out, and Bob used to mail them out sometimes.

Q What were your hours of work?

A From eight to five.

Q Did you put in any extra hours at any time?

A Many, many, many times, Saturdays and Sundays included.

Q There has been testimony here that Mr. Lowell worked fifty to sixty hours a week. Did you observe whether he put in those kinds of hours?

A Not every week. It may have been very sporadic, but surely there were times when we both worked late, and he would remain, but for the most part no.

Q But you worked late yourself from time to time?

A Yes.

Q When you left, when you finally left, were you given any kind of compensation of any kind from any source?

A Well, it was just before my vacation, and I asked Mr. Lowell if I was going to get my vacation pay, and he said no. So, I didn't get any pay at all from LEM, but after that I wrote a letter to Twin Disc explaining the situation there, and that I had been discharged without the benefit of any benefits, and subsequent to that letter, they

were good enough to send me a check to cover both a severance of two weeks and two weeks' vacation.

MR. HUGHES: I have no further questions.

CROSS EXAMINATION

BY MR. BOBBE:

Q Mr. Samuel, had you worked under Mr. Lowell prior to your employment by LEM Instrument Corp.?

A Yes, I had.

Q Where did you work with him?

A We worked together at a company called Guidance Control Corporation.

Q Was Mr. Everett also an employee there at Guidance Control?

A Yes, he was.

Q Did you seek employment with IEM after you left Guidance Control?

A No, I -- when I left Guidance Control I was employed by a company called Air-Royal Company in New Jersey, as an industrial sales engineer.

Q When did you leave them?

A Just prior to joining LEM, the weekend before.

Q The weekend before what?

A I believe it was the 15th of January that I joined LEM.

Q Now, when you were --

THE COURT: '69 or '68?

THE WITNESS: '69.

Q Didn't you work for a company known as Pars-Am Research before you joined LEM?

A No, it was previous to me going with Air-Royal I worked for Pars-Am.

THE COURT: What difference does that make? He came to work for them in January of '69.

Q Mr. Samuel, when you were discharged by Mr. Lowell I think you said that was the end of May, 1970?

A I believe, as I recall.

Q Then you were away for a few days, is that right?

A Yes.

Q Then you came back and this was after Mr. Everett had spoken to you, and then you were with LEM Instrument how long after you came back?

A As I recall, it must have been, maybe, four or five weeks.

Q During that time there was no difficulty whatever between you and Mr. Lowell, is that right?

A Well, we sort of avoided each other for the most part.

Q You worked together too, didn't you?

A I said we sort --

Q Excuse me?

A I said we sort of avoided each other, and when we did have to talk, it was done without any animosity, you know.

Q The relations were amicable during that month or so, weren't they?

A Yes, for a change.

Q Well, they were, weren't they?

A Yes. Yes, they were.

Q When you decided to leave, didn't you tell him that you had other commitments that you were going to honor?

A I said I had other commitments or other plans that I was going to try to generate, and that I couldn't any longer work under the conditions -- I couldn't work for him any longer.

Q You told him that?

A Yes, right to his face.

Q You applied later for unemployment insurance, didn't you?

A Yes, I did.

Q You claimed that you had been discharged the second time, didn't you?

A No, I didn't claim I had been discharged the second time. I claimed that I had been discharged the first time and that the second I was back there was not as a regular employee, but rather as getting paid for services rendered which was no longer a contract of employment.

Q Your claim for unemployment insurance was denied, wasn't it?

A That's correct.

Q Now --

A It was denied because Mr. Lowell stated that I had quit to go into my own business, which was not the truth.

Q Well, you did tell him that you were going into your own business, didn't you?

A I told him that I had other commitments that I was going to try to formulate, some plans, but I had no money to go into my own business. All I could do was fix

television sets, other than do the kind of work that I was doing there.

Q So far as he knew you told him you had other commitments

A I told him I had other plans and I didn't want any further abuse.

Q Well now, you bear a grudge against him for having opposed your unemployment insurance, don't you?

A No, I don't have a grudge. I did at the time.

Q I beg your pardon?

A I did at the time. I went ten weeks without any employment and without any income, and it was during a time when engineering was sort of dead on Long Island.

Q You testify now that you are a consulting engineer, is that right?

A That's correct.

Q Does that mean you merely accept employment from time to time on a consulting basis?

A That's correct.

Q You have no actual employment?

A That's correct.

Q Have you had any since you left LEM Instrument Corp.?

A Yes.

Q How many other jobs have you held?

A Two.

Q Mr. Everett admitted that he did from time to time tease you during the time you were working there. Do you recall that?

A Yes, we used to tease each other.

Q Did you take any offense at that?

A No.

Q Do you recall what he said on any of these occasions?

A Not really. We have been doing this for years. He never made any remarks as far as any racial remarks.

Q Well, Mr. Lowell didn't either, did he?

A No.

Q They had respect for you as an individual, I assume?

A We had mutual respect, yes.

Q At the time that you had the quarrel, did you throw anything?

A I think I threw a pencil on the floor. I was angry, and I threw the pencil down, and Bob said it hit him.

He told me that later, but I didn't know at the time.

Q You are sure it wasn't a saw that you threw?

A I'm certain. I know the difference between a saw and a pencil.

Q Didn't you threaten Mr. Lowell with physical abuse?

A I did not.

Q Would you say that there were any words that were spoken between you?

A Yes, there were some heated words.

Q You were the one who first took offense at what you had overheard, isn't that so?

A That's correct.

Q Isn't it a fact that you merely overheard a conversation that was not directed to you?

A This is true to an extent. The way I took it, I was being told this loud enough through Everett, but directed to me. He knew I could hear it.

Q You say he knew it, but this was in his office that this conversation occurred, with Everett, wasn't it?

A Yes, and the door was opened into the assembly area.

Q What was it that you overheard him say?

A I don't remember at the present time, but it was uncomplimentary to say the least.

Q Uncomplimentary to your work?

A To my work, yes, just about in general to my work.

Q You wouldn't be willing to accept the statement that he merely said, "Mr. Samuel had done the work out of the order in which I had asked to have it done"?

A That was part of the context of what he was saying.

Q Would you remember anything else?

A Only a few uncomplimentary names and other remarks.

Q Well, you don't remember what they were?

A Not really because I didn't dwell on them.

Q And it made you very angry?

A Yes.

Q You lost your temper, didn't you?

A I was angry.

Q I say, you lost your temper?

A I wouldn't quite go that far.

MR. HUGHES: Well, your Honor -- withdrawn.